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No. __-____

IN THE
Supreme Court of the United States

CHARLES ODELL WELDON AND
ERIC A. WILES, INDIVIDUALLY AND IN HIS CAPACITY AS
EXECUTOR OF THE ESTATE OF LARRY ARNOLD WILES,
Petitioners,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER J. HICKEY
MARY BRIGID SWEENEY
BRENT COON AND ASSOCIATES
1220 West Sixth Street
Suite 303
Cleveland, Ohio 44113
(216) 241-1872

DAVID C. FREDERICK
Counsel of Record
KELLY P. DUNBAR
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Petitioners

March 11, 2008

QUESTION PRESENTED

Whether a state law may impose on plaintiffs bringing asbestos claims preliminary evidentiary medical requirements in cases brought in state court as a condition precedent to the exercise of rights under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*, and the Locomotive Boiler Inspection Act, 49 U.S.C. § 20701 *et seq.*

PARTIES TO THE PROCEEDINGS

Petitioners Charles Odell Weldon and Eric A. Wiles, individually and in his capacity as executor of the estate of Larry Arnold Wiles, were defendants in the proceedings before the Court of Common Pleas, Cuyahoga County, and the appellees in the proceedings before both the Ohio Court of Appeals and the Ohio Supreme Court.

Respondent Norfolk Southern Railway Company was the plaintiff in the proceedings before the Court of Common Pleas, Cuyahoga County, and the appellant in the proceedings before both the Ohio Court of Appeals and the Ohio Supreme Court.

Homer R. Bogle and William H. Monroe, Jr., as administrator of the estate of Worth Oliver Bryant, also were defendants in the proceedings before the Court of Common Pleas, Cuyahoga County, but were voluntarily dismissed from the appeal.

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Charles Odell Weldon and Eric A. Wiles, individually and in his capacity as executor of the estate of Larry Arnold Wiles, respectfully petition for a writ of certiorari to review the judgment of the Ohio Supreme Court in this case.

INTRODUCTION

This case raises fundamental questions about the ability of states to impose rules that encumber the exercise of substantive federal rights in state courts because of a state's disagreement with the policies and objectives served by federal law. For more than a century, federal and state courts — including this Court — have confronted difficult questions regarding when states may, and may not, apply rules of "procedure" to federal claimants under the Federal Employers' Liability Act ("FELA") in state court. This Court has repeatedly held that states are prohibited by the Supremacy Clause from applying any state rule to FELA plaintiffs that is at odds with the broad remedial purposes of the statute.

Contrary to an impressive line of federal precedent, the Ohio Supreme Court held that application of an Ohio statute that aims to reduce total asbestos liability and imposes preliminary evidentiary burdens on plaintiffs who seek to vindicate federal rights in state court may alter the evidentiary rules that long have governed claims brought under the FELA. The court upheld statutory rules that impose *stricter* threshold medical evidentiary requirements than asbestos plaintiffs would need to satisfy as a matter of substantive law to have a claim submitted to a jury or to recover under the FELA if litigated in federal court. That holding cannot be reconciled with this Court's FELA preemption decisions or the aims of the FELA itself.

The issues raised by the decision below strike at the heart of this Court's FELA decisions and the interests protected by the Supremacy Clause, and the Ohio court's decision conflicts with decisions of other state supreme courts. The Ohio court's decision upholding application of Ohio's precedent-setting asbestos statute to federal claims gives a green light to all states that seek to rework the elements of federal claims in their efforts to control asbestos litigation. This Court should grant review of the Ohio Supreme Court's decision and reaffirm the core principle animating the Supremacy Clause that, even in the pursuit of arguably laudable ends, states may not disregard the supremacy of federal law. Certiorari is independently warranted as the decision below creates an immediate disparity in application of the FELA both within Ohio and nationwide: plaintiffs in Ohio now face substantially higher burdens in pursuing FELA claims in state courts than they would in federal court in Ohio, and they face more restrictive rules in Ohio state court than plaintiffs in other states. In light of Congress's overriding purpose in enacting the FELA of creating national uniformity, such a glaring disparity cannot be left uncorrected by this Court.

OPINIONS BELOW

The opinion of the Ohio Supreme Court (Pet. App. 1a-16a) is reported at 875 N.E.2d 919. The opinion of the Ohio Court of Appeals (Pet. App. 17a-31a) is reported at 850 N.E.2d 1281. The orders and opinion of the Court of Common Pleas (Pet. App. 32a-39a) are not reported.

JURISDICTION

The Ohio Supreme Court entered its judgment on October 10, 2007. A motion for reconsideration was denied on December 12, 2007. *See* Pet. App. 40a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* ("FELA"), the Locomotive Boiler Inspection Act, 49 U.S.C. § 20701 *et seq.* ("LBIA"), and H.B. 292 (2004 Ohio Laws File 88 (Am. Sub. H.B. 292)) are set forth at Pet. App. 41a-74a.

STATEMENT OF THE CASE

A. The FELA

The rapid growth of railroads in the late twentieth century drove the nation's economic ascendency. That progress came, however, with considerable costs, including pervasive injuries and death suffered by the nation's railroad workers. As President Benjamin Harrison told Congress in 1889, "[i]t is a reproach to our civilization that any class of American workmen, should in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war." Melvin L. Griffith, *The Vindication of a National Public Policy Under the Federal Employers' Liability*

Act, 18 Law & Contemp. Probs. 160, 162 (1953). Those dangers were compounded by the fact that the task of regulating railroad safety during that time "fell . . . to the states through which the lines ran." *Id.* State-by-state regulation was "chaotic," and the "lack of uniformity" in laws "contributed greatly to the casualty lists among . . . railroad men." *Id.*

Congress responded to those concerns in 1908 by enacting comprehensive, national legislation designed to recompense railroad workers for their injuries. The FELA fulfilled several objectives.

"One of the purposes of the [FELA] was to 'create uniformity throughout the Union' with respect to railroads' financial responsibility for injuries to their employees." *Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490, 493 n.5 (1980) (quoting H.R. Rep. No. 60-1386, at 3 (1908)). As this Court explained in the decade following the FELA's enactment, "[w]hether and in what circumstances railroad companies . . . shall be required to compensate their employees . . . are matters in which the nation as a whole is interested, and there are weighty considerations why the controlling law should be uniform and not change at every state line." *New York Cent. R.R. v. Winfield*, 244 U.S. 147, 149 (1917).

The FELA also reflected Congress's judgment regarding the special needs of railroad workers. *See Sinkler v. Missouri Pac. R.R.*, 356 U.S. 326, 329 (1958). Indeed, an aim driving enactment of national legislation was "eliminat[ing] a number of traditional defenses to tort liability" under state law that had thwarted railroad workers' injury claims in order "to facilitate recovery." *Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557, 561 (1987). In view of those intentions, the FELA has consistently been construed in light of

Congress's "broad purpose" of promoting the welfare of railroad workers. *Sinkler*, 356 U.S. at 329-30. This Court also has stressed that the FELA "is defined in broad language, which has been construed even more broadly," and that courts must use "a standard of liberal construction in order to accomplish Congress' objects." *Buell*, 480 U.S. at 561-62 (footnote, brackets, and internal quotations omitted).

In enacting the FELA, Congress elected to forgo a workers' compensation scheme. The FELA thus provides that "[e]very common carrier by railroad" engaged in interstate commerce "shall be liable in damages to any person suffering injury while he is employed by such carrier" due to negligence of the railroad. 45 U.S.C. § 51. Under the FELA, plaintiffs may elect to pursue their remedies in federal or state court. *See id.* § 56.[1]

The FELA encompasses a wide array of injuries to railroad workers. Cognizable harm under the FELA includes not only physical injuries arising from accidents, but also occupational diseases arising from workplace exposure to asbestos. *See Norfolk & Western Ry. v. Ayers*, 538 U.S. 135, 150-57 (2003) (FELA includes damages from asbestosis, including fear-of-cancer injuries); *Urie*, 337 U.S. at 180-81 ("breadth" of FELA and its "humanitarian" purpose

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[1] The LBIA imposes absolute liability on carriers for injuries caused by unsafe locomotive conditions. *See* 49 U.S.C. § 20701(1). The LBIA was enacted subsequent to the FELA and "does not purport to confer any right of action upon injured employees," but it does "substantively . . . amend[] . . . the [FELA]." *Urie v. Thompson*, 337 U.S. 163, 188-89 (1949). The statutes are interpreted *in para materia* with the "purpose and effect of facilitating employee recovery." *Id.* at 189.

counsel in favor of reading FELA to cover "occupational disease" such as silicosis).

B. Ohio's Asbestos Reform — H.B. 292

In 2004, Ohio adopted a path-breaking statute aimed at overhauling asbestos litigation, including litigation arising under federal laws such as the FELA. *See* 2004 Ohio Laws File 88, Am. Sub. H.B. No. 292 ("H.B. 292").

The purpose of H.B. 292 was to reduce total liability paid by defendants in connection with asbestos claims. The state legislature explained its view that "[t]he current asbestos personal injury litigation system" under state and federal law "is unfair and inefficient, imposing a severe burden on litigants and taxpayers alike." H.B. 292 § 3(A)(2). The legislature expressed a concern with aggregate liability, finding that, "[n]ationally, asbestos personal injury litigation has already contributed to the bankruptcy of more than seventy companies." *Id.* § 3(A)(4). The magnitude of that liability, the legislature concluded, had caused unemployment and was having a "ripple effect" throughout the national economy. *Id.* § (3)(A)(4)(a)-(e). The legislature further found it inappropriate that successful asbestos claims were being brought by those "who have some physical sign of exposure to asbestos," but who, in the legislature's judgment, "are not sick." *Id.* § (3)(A)(5).

In an effort to restrict the ability of asbestos claimants to proceed with claims, H.B. 292 imposes on such plaintiffs detailed threshold evidentiary requirements, which apply to federal as well as state claims: while excepting bankruptcy and workers' compensation claims, H.B. 292 applies to all other "civil action[s]" brought in tort under state or federal

law. Ohio Rev. Code Ann. § 2307.91(M). There is no exception for claims brought under the FELA.

As relevant here, H.B. 292 erects conditions precedent to bringing nonmalignant, lung cancer, and wrongful death claims. The statute provides that "[n]o person shall bring . . . a tort action alleging an asbestos claim based on a nonmalignant condition in the absence of a prima-facie showing . . . that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is a substantial contributing factor to the medical condition." *Id.* § 2307.92(B). The prima facie showing consists of meticulous evidentiary submissions that must be made in order for a suit to proceed. *See, e.g., id.* § 2307.92(B)(1), (2). H.B. 292 goes so far as to regulate with great detail the tests that must be used to satisfy the showing, *see id.* § 2307.92(B)(3), as well as the qualifications of the medical professionals that conduct the tests, *see, e.g., id.* § 2307.92(B)(1) (evidence must come from a "competent medical authority"); *id.* § 2307.91(Z) (establishing multipronged requirements for "competent medical authority").

H.B. 292 requires lung cancer claimants to make similar showings. Such claimants must provide "[e]vidence of the exposed person's substantial occupational exposure to asbestos." *Id.* § 2307.92(C)(1)(c)(1). Substantial occupational exposure can be shown only if highly specific medical conditions are satisfied. *See id.* § 2307.91(GG). The statute also creates rebuttable presumptions governing this showing: there is a default "presumption," which the plaintiff has the "burden of proof to rebut," that 10 years have elapsed

from the date of exposure to asbestos and lung cancer. *Id.* § 2307.92(C)(1)(b).[2]

Under H.B. 292, when a defendant challenges a plaintiff's compliance with the threshold evidentiary rules, "the court shall determine from all of the evidence submitted whether the proffered prima-facie evidence meets the minimum requirements" of the statute. *Id.* § 2307.93(B). Whereas a failure to satisfy the threshold evidentiary rules results in "administrative[] dismiss[al] . . . without prejudice" until such time as a plaintiff can satisfy the rules, *id.* § 2307.93(C), if a plaintiff does satisfy the threshold requirements, the court's findings "are not admissible at trial" and create no "presumption" of liability or injury, *id.* § 2307.92(G).

C. Proceedings in State Court

1. Prior to enactment of H.B. 292, petitioners Charles Weldon and Eric Wiles, individually and in his capacity as executor of the estate of Larry Wiles, brought suit in the Cuyahoga County Court of Common Pleas in Ohio exclusively under the FELA and the LBIA. The complaint alleges that petitioners, former employees of Norfolk, were exposed to asbestos as a result of negligence of Norfolk and that, as a result, petitioners contracted "occupational pneumoconiosis including but not limited to asbestosis, silicosis, and[/]or coal workers lung disease and/or lung cancer." Compl. ¶ 14. The complaint also alleges damages resulting from petitioners' fear of contracting cancer as a result of physical conditions. *See id.* ¶ 15.

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[2] Wrongful death claimants are required to satisfy similar evidentiary burdens and face additional rules regarding burdens of proof. *See* Ohio Rev. Code Ann. § 2307.92(D).

After enactment of H.B. 292, Norfolk brought an action in state court seeking a declaration that (i) petitioners failed to comply with threshold evidentiary requirements set forth in H.B. 292; (ii) H.B. 292 applies to federal-law claims, including those brought under the FELA; and (iii) H.B. 292 does not violate the Supremacy Clause. The court dismissed Norfolk's action, holding that federal law preempted application of H.B. 292 to petitioners' FELA claims. *See* Pet. App. 34a-39a.

Norfolk appealed the trial court's decision. The Eighth District Court of Appeals affirmed the district court, holding that application of H.B. 292 to FELA claimants was preempted as it unlawfully burdened the exercise of federal rights. *See id.* at 17a-31a. The court of appeals applied the principle that "[p]eculiarities of local law may not gnaw at rights rooted in federal legislation" and held that H.B. 292 would undermine petitioners' "substantive rights to assert a cause of action under federal law." *Id.* at 29a (internal quotations omitted).

2. The Ohio Supreme Court reversed the decision of the Ohio appellate court, with two justices dissenting. *See* Pet. App. 1a-16a.

The court began by noting that the legislature enacted H.B. 292 based on its judgment that the current asbestos litigation system is "unfair and inefficient." *Id.* at 2a. The court then addressed whether "the prima facie filing requirements" of H.B. 292 are "substantive or procedural," noting that the FELA "preempts all substantive state law in the field." *Id.* at 7a. Relying entirely on state law to answer that question, the court held that H.B. 292 was procedural on the ground that it does not "grant a right or impose a duty that gives rise to a cause of

action." *Id.* (internal quotations and brackets omitted). The court explained that, notwithstanding the fact that H.B. 292 creates conditions precedent to the exercise of federal rights in state court, "the impact of [H.B. 292] is to establish a procedural prioritization of the asbestos-related cases on the court's docket. Nothing more." *Id.* at 7a-8a. H.B. 292, the court concluded, thus imposes no "substantive burdens." *Id.* at 8a.

The court's view of H.B. 292 as procedural did not "end [its] analysis," however, as even procedural rules may be preempted if they "impair a claimant's ability to enforce a federal right." *Id.* The court concluded that H.B. 292 did not impair rights under the FELA, relying primarily on this Court's decisions in *Minneapolis & St. Louis Railroad v. Bombolis*, 241 U.S. 211 (1916), and *Missouri ex rel. Southern Railway v. Mayfield*, 340 U.S. 1 (1950). *See* Pet. App. 9a-10a. Echoing its conclusion that H.B. 292 was procedural, but without analyzing the effects of H.B. 292, the court held that H.B. 292 fell within the purview of those cases because it does not "bear upon [a FELA plaintiff's] substantive right to recover." *Id.* at 12a (internal quotations omitted).[3]

Chief Justice Moyer and Justice Pfeifer dissented. The dissenting justices rejected the view that H.B.

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[3] Although H.B. 292 purports to apply to claims brought in federal and state court, *see* Ohio Rev. Code Ann. § 2307.91(M), the court below considered H.B. 292's application to FELA claims brought in state court, *see* Pet. App. 12a. Because a state cannot dictate rules of procedure in federal court (in a non-diversity case) or prescribe the elements of federal law, H.B. 292 cannot apply to federal claims brought in federal court. Therefore, one effect of the decision is to create a disparity in FELA's application between state and federal courts within Ohio.

292 was a mere rule of procedure, explaining that "'[t]he new Ohio requirement precludes [FELA] claimants from proceeding on their claims until filing the report satisfying [H.B. 292's] requirements,'" which, the dissenters reasoned, "'would "gnaw" at the [FELA] claimants' substantive rights to assert a cause of action under federal law in a state court.'" *Id.* at 15a-16a (quoting Pet. App. 29a (¶ 26)).

REASONS FOR GRANTING THE PETITION

This Court has regularly granted certiorari to review state high court decisions out of step with Congress's purposes in enacting the FELA, as interpreted by a long line of decisions of this Court. The decision below falls squarely within that category of cases, as it upholds a state legislature's effort to limit rights available under state and federal law, including the FELA. Because that holding rests on a deep misunderstanding of this Court's FELA jurisprudence in an area where national uniformity and a broad remedial approach to railroad workers' injuries are crucial, the petition should be granted.

In addition, as shown in Part II of this petition, the decision of the Ohio Supreme Court will only deepen the longstanding confusion in and divisions among state high courts regarding FELA preemption. Left standing, the decision below invites other state legislatures and courts to encumber the exercise of federal rights in efforts to reform asbestos litigation, an outcome that can be reconciled neither with this Court's FELA decisions nor with the Supremacy Clause.

I. THE DECISION OF THE OHIO SUPREME COURT CONFLICTS WITH DECISIONS OF THIS COURT AND UNDERMINES THE NATIONAL POLICY EMBODIED IN THE FELA

A. The Court Below Erred In Holding That Application Of H.B. 292 To FELA Claims Is A Matter Only Of Local Procedure

The Ohio Supreme Court held that "the impact of [H.B. 292] is to establish a procedural prioritization of the asbestos-related cases on the court's docket." Pet. App. 7a. H.B. 292, the court concluded, could not be preempted because it "pertain[s] to the machinery for carrying on a suit" and is thus "procedural in nature, not substantive." *Id.* at 8a. The court's fundamental error on a matter of federal law warrants this Court's review.[4]

1. H.B. 292's Purpose of Reducing Total Asbestos Liability Evidences the Substantive Nature of the Threshold Evidentiary Rules

Felder v. Casey, 487 U.S. 131 (1988) — a decision not cited by the court below — provides the proper framework for analyzing the procedural or substantive nature of H.B. 292. There, this Court held that a Wisconsin statute could not impose an additional threshold filing requirement on plaintiffs bringing 42 U.S.C. § 1983 claims in state court. The Wisconsin

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[4] The Ohio Supreme Court independently erred in applying state law to determine whether H.B. 292 was procedural. Whether a rule is procedural or substantive is decided by federal, not state, law. *See Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330, 333-35 (1988) (rejecting view that rule regarding prejudgment interest was "a mere 'rule of procedure'" because under *federal* law "the proper measure of damages . . . is an issue of substance") (internal quotations omitted).

Supreme Court had upheld the statute, which dictated that, "before suit may be brought in state court against a state or local governmental entity or official," a plaintiff must provide notice to the government. *Id.* at 134. The Wisconsin court held that, "while Congress may establish the procedural framework under which claims are heard in federal courts, States retain the authority under the Constitution to prescribe the rules and procedures that govern actions in their own tribunals." *Id.* at 137.

In reversing the Wisconsin Supreme Court's decision, this Court articulated principles that control the outcome here. The Court rejected the view that the Wisconsin statute was solely procedural, reasoning that "it conditions the right of recovery that Congress has authorized, and does so for a reason manifestly inconsistent with the purposes of the federal statute: to minimize governmental liability." *Id.* at 141. The Court explained that "[t]he state notice-of-claim statute is more than a mere rule of procedure," as it "is a substantive condition on the right to sue governmental officials." *Id.* at 152. "State courts," the Court concluded, "are not free to vindicate the substantive interests underlying a state rule of decision at the expense of the federal right." *Id.*

Those principles apply here and establish why the Ohio Supreme Court erred in classifying H.B. 292 as procedural. The aim of H.B. 292, like the statute in *Felder*, is to reduce the number of successful claims, thereby reducing total liability. *See supra* p. 6. Thus, just as in *Felder*, H.B. 292's threshold evidentiary rules are substantive as they "condition[] the right of recovery that Congress has authorized [under the FELA], and do[] so for a reason manifestly

inconsistent with the purposes of the federal statute: to minimize . . . liability." 487 U.S. at 141.[5]

2. *The Operation of H.B. 292's Threshold Evidentiary Rules Imposes Substantive Burdens That Conflict with This Court's and Other State Court Decisions*

Beyond the purpose of the state statute, H.B. 292's threshold evidentiary requirements operate in a more substantive fashion than as simple rules of procedure. In short, these state rules effectively alter the substance of federal FELA claims.

First, as a matter of federal substantive law, this Court has adopted rules governing causation and proof of causation under the FELA. "[T]he test [for causation] . . . is simply whether the proofs justify . . . the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 506 (1957). That "relaxed standard of causation" reflects "Congress' remedial goal" in enacting the FELA. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994). In this sense, the Ohio Supreme Court's ruling below — affirming strict causation standards — directly conflicts with the holding of the Nebraska Supreme Court in *Naidoo v. Union Pacific Railroad*, 402 N.W.2d 653, 657 (Neb. 1987): "The traditional concept of proximate cause is abrogated in FELA cases by the fact that the plaintiff's proof is sufficient to

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[5] Clear evidence of the legislature's aim to reign in what it perceived to be overly expansive federal remedies comes from the fact that H.B. 292 restricts an entire category of claims — fear-of-cancer claims — that this Court has squarely held are recoverable. *Compare* Ohio Rev. Code Ann. § 2307.94(B) (eliminating fear-of-cancer claims) *with Ayers*, 538 U.S. at 157-59.

state a claim if it shows that the carrier's negligence, however slight, played some part in causing the injury."[6]

H.B. 292 imposes a different, stricter causation standard: as a threshold matter, an injured railroad worker must show that "exposure to asbestos" is "a *substantial contributing factor* to the medical condition." Ohio Rev. Code Ann. § 2307.92(B) (emphasis added); *see id.* § 2307.92(B)(2) (plaintiff must present evidence of "most probable causes of . . . medical problems"). The effect of the threshold evidentiary rules is thus substantive: whereas federal law would require a FELA plaintiff to satisfy a relaxed standard of causation to have a question submitted to a jury or even to prevail, under H.B. 292 a plaintiff must, to avoid permanent dismissal, satisfy a stricter standard of "substantial contributing factor." *See id.* § 2307.91(FF) ("substantial contributing factor" must be "predominate cause" of injury and supported by "reasonable degree of medical certainty").

Second, the Ohio Supreme Court's ruling conflicts with this Court's well-settled precedent that quanta

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[6] This Court avoided deciding whether the FELA dispenses with a proximate cause requirement and the import of *Rogers* in *Norfolk Southern Railway v. Sorrell*, 127 S. Ct. 799, 804-05 (2007). The key point here is that *no* construction of the FELA's causation standard, which is an important part of the substance of a FELA claim, is consistent with Ohio's "substantial contributing factor" formulation. *Compare id.* at 813 (Ginsburg, J., concurring in the judgment) (noting that, "[i]n FELA cases, strong policy considerations inform the causation calculus" and that, whatever the legal label, *Rogers* stands for the proposition that "a FELA plaintiff can get to a jury if he can show that his employer's negligence was even the slightest cause of his injury") *with id.* at 810 (Souter, J., concurring) (causation standard is whether "negligence was the proximate cause in whole or in part") (internal quotations omitted).

and burdens of proof under the FELA are matters of federal *substantive* law. *See, e.g., Central Vermont Ry. v. White*, 238 U.S. 507, 512 (1915) ("[I]t is a misnomer to say that the question as to the burden of proof . . . is a mere matter of state procedure."); *New Orleans & N.E.R.R. v. Harris*, 247 U.S. 367, 372 (1918) ("burden of proof is a matter of substance and not subject to control by laws of the several States").[7] As this Court explained in *Brady v. Southern Railway*, 320 U.S. 476 (1943), under the FELA, and by virtue of "the supremacy clause," whether evidence submitted in a FELA case is sufficient to establish liability is an issue of federal law: "[o]nly by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states." *Id.* at 479.

Here again, H.B. 292's threshold evidentiary rules substantively depart from those well-entrenched principles: H.B. 292 regulates what a FELA plaintiff must prove and the manner in which that proof must be satisfied. Plaintiffs alleging nonmalignant, lung cancer, or wrongful death claims face a series of detailed burdens of proof and production that have no connection to the substantive law of the FELA. *See supra* pp. 7-8. To classify such rules as procedural and "[n]othing more," as did the court below, Pet. App. 7a-8a, is a "misnomer," *White*, 238 U.S. at 512.

Third, as a matter of substantive federal law governing the FELA, even the slightest evidence is adequate to raise a jury question, and circumstantial

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[7] *See* Alfred Hill, *Substance and Procedure in State FELA Actions – the Converse of the Erie Problem*, 17 Ohio St. L.J. 384, 388-90 (1956) (proof issues under FELA must "accord with the basic purposes of the substantive federal policy being executed" under the statute).

evidence is alone sufficient. *See Rogers*, 352 U.S. at 508 & n.17; *supra* note 6; *see also Mendoza v. Southern Pac. Transp. Co.*, 733 F.2d 631, 632-33 (9th Cir. 1984) (under federal principles, "only 'slight' or 'minimal' evidence" is necessary to raise "jury question" under FELA, and jury has "broad power to engage in inferences in FELA cases"). In FELA cases, moreover, it has long been a guiding principle that "'close or doubtful' cases should not be taken from the jury." Hill, 17 Ohio St. L.J. at 401.

Dice v. Akron, Canton & Youngstown Railroad, 342 U.S. 359 (1952), illustrates that point. There, the Ohio Supreme Court held that, under state rules of procedure, "factual issues as to fraud in the execution of [a] release were properly decided by the judge rather than by the jury." *Id.* at 361. This Court reversed, holding that "to deprive railroad workers of the benefit of a jury trial where there is evidence to support negligence 'is to take away a goodly portion of the relief which Congress has afforded them.'" *Id.* at 363 (quoting *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 354 (1943)). The right of railroad workers to have a jury decide the issue of fraud is "too substantial a part of the rights accorded by the [FELA] to permit it to be classified as a mere 'local rule of procedure.'" *Id.*

Dice long ago rejected the very approach that H.B. 292 imposes as a prerequisite to bringing suit in state court. H.B. 292 requires a judge to resolve issues of the sufficiency of evidence and burdens of proof, even though those rules bear no relationship to, and in fact exceed, what a FELA plaintiff would need to show to have a question submitted to the jury. Because states are not free under *Dice* to take close questions of fact away from the jury at trial,

they may not enact statutes that require state judges to take questions from the jury by ensuring that issues of fact never proceed to trial in the first place.

B. The Court Below Erred In Holding That Application Of H.B. 292 To FELA Claims, Even If A Matter Of Local Procedure, Does Not Unduly Burden Federal Rights

1. H.B. 292's Threshold Evidentiary Rules Unduly Burden Federal Rights

Whether classified as procedural or substantive, H.B. 292 is preempted under the Supremacy Clause in purporting to impose threshold evidentiary rules on FELA claimants in state court. "[A] substantive right . . . arising under the [FELA] cannot be lessened or destroyed by a rule of practice." *Norfolk Southern R.R. v. Ferebee*, 238 U.S. 269, 273 (1915); *see South Buffalo Ry. v. Ahern*, 344 U.S. 367, 372 (1953) ("[P]eculiarities of local law may not gnaw at rights rooted in federal legislation."); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) (Holmes, J.) ("Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal Rights . . . is not to be defeated under the name of local practice.").

The Ohio Supreme Court's decision to uphold H.B. 292 cannot be squared with this Court's decision in *Brown v. Western Railway of Alabama*, 338 U.S. 294 (1949). In *Brown*, a railroad worker brought suit in Georgia state court under the FELA for injuries allegedly sustained while working in railroad yards. *See id.* at 295. The trial court, in a decision upheld by the Georgia Supreme Court, dismissed the complaint, applying a "Georgia rule of practice to construe pleading allegations most strongly against the pleader." *Id.* (internal quotations omitted). This

Court reversed the decision below, holding that rights under the FELA "cannot be defeated by the forms of local practice." *Id.* at 296. "Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws." *Id.* at 298. A failure "to protect federally created rights" from "over-exacting local requirements" would undermine "uniformity in adjudication of federally created rights." *Id.* at 299.

A straightforward application of *Brown* makes clear that H.B. 292 cannot be applied to FELA plaintiffs in light of the substantial burdens that H.B. 292 imposes on FELA claimants. *See supra* pp. 14-18. Indeed, the burdens here are far more substantial than those in *Brown*, which involved a contest between liberal and strict pleading standards, reflecting "different concepts concerning the functions the pleadings are to serve in such matters as adequacy of notice and definition of the factual issues." Hill, 17 Ohio St. L.J. at 409 n.150. H.B. 292, on the other hand, imposes threshold *evidentiary* (rather than pleading) burdens that exceed the *substantive* showing that would be required as a matter of federal law and that operate as conditions precedent to the exercise of federal rights. As a matter of law and basic consistency, *Brown* requires reversal of the Ohio Supreme Court's decision.

The Ohio Supreme Court's proposed distinctions of *Brown* have no merit. *See* Pet. App. 12a-13a. The court first held that the pleading practice in *Brown* was "antithetical to that used in the federal courts." *Id.* at 13a. But that is no distinction at all: H.B. 292 imposes preliminary evidentiary burdens that exceed the showings that a FELA plaintiff would be required to make at trial or in federal court. *See*

supra note 3. To the extent the court based this conclusion on the practice of the federal MDL court, that reasoning is seriously flawed, as discussed below. *See infra* pp. 24-25. The court also held that the rule in *Brown* was "a dismissal with prejudice, while . . . failure to comply with the prima facie filing requirements carries no such penalty." Pet. App. 13a. That is a distinction without a difference: the consequence of H.B. 292 is that a FELA plaintiff *cannot proceed* with a claim unless he or she satisfies evidentiary burdens that exceed those the plaintiff would need to make out to establish ultimate liability. That is not procedural prioritization; that is *de facto* dismissal *with* prejudice.

Moreover, the decision below is inconsistent with two well-established policies underlying the FELA. *First*, this Court has long held that the FELA is to be interpreted broadly to advance the welfare of railroad workers. *See, e.g., Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958) ("it is clear that the general congressional intent [in enacting the FELA] was to provide liberal recovery for injured workers"); *Urie*, 337 U.S. at 181-82 ("[R]estriction[s] as to the kinds of employees covered, the degree of negligence required, or the particular sorts of harms inflicted, would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the [FELA] followed by this Court."); *Jamison v. Encarnacion*, 281 U.S. 635, 640 (1930) ("[The FELA] is not to be narrowed by refined reasoning . . . . It is to be construed liberally to fulfill the purposes for which it was enacted . . . ."). The substantial and substantive burdens imposed by H.B. 292 on FELA plaintiffs,

enacted out of a desire to reduce total asbestos recovery, cannot be reconciled with that principle.[8]

Second, application of H.B. 292 to FELA claims undermines Congress's "purpose[]" of "'creat[ing] uniformity throughout the Union' with respect to railroads' financial responsibility for injuries to their employees." *Liepelt*, 444 U.S. at 493 n.5 (quoting H.R. Rep. No. 60-1386, at 3). By setting itself apart, Ohio now upsets that uniformity, and the logic of the decision below would invite other states to erect substantial and conflicting roadblocks before plaintiffs asserting rights under the FELA. In that sense, the Ohio approach could not conflict more starkly with that of California, whose Supreme Court has held that "Congress enacted the FELA to achieve national uniformity in personal injury actions by railroad employees against their employers." *Lund v. San Joaquin Valley R.R.*, 71 P.3d 770, 779 (Cal. 2003). For that reason, even if an issue "could be considered procedural rather than substantive, state procedure must give way if it impedes the uniform application of the federal statute essential to effectuate its purpose." *Id.* (internal quotations omitted).[9]

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[8] The burden on railroad workers in Ohio is intensified by the fact that H.B. 292 excludes workers' compensation claims (a remedy that is foreclosed to FELA plaintiffs). *See supra* p. 6. FELA plaintiffs who cannot satisfy the threshold burdens have no remedy under state or federal law.

[9] *See Ahern*, 344 U.S. at 371-72 (FELA, "supplanting a patchwork of state legislation with a nationwide uniform system of liberal remedial rules," prevents "[s]tate legislatures" from "destroy[ing] uniformity"); *see also McGraw v. Norfolk & Western Ry.*, 500 S.E.2d 300, 304 (W. Va. 1997) ("[O]nly if federal law controls can FELA be given the uniform application throughout the country essential to effectuate its purposes.") (internal quotations omitted).

2. *The Ohio Supreme Court's Rationales for Holding That H.B. 292 Does Not Burden Federal Rights Are Deeply Flawed*

In concluding that H.B. 292 does not burden rights under the FELA, the court below failed to judge the effects of H.B. 292 in light of the broad remedial purposes of the statute and this Court's insistence on uniformity in FELA jurisprudence. Two specific errors infect the court's analysis.

a. Bombolis *and* Mayfield *do not support the decision below*

The Ohio Supreme Court held that this Court's decisions in *Bombolis* and *Mayfield* "support the position that the application of the prima facie filing requirements . . . does not violate the Supremacy Clause." Pet. App. 9a. That is not so. First, there is a substantial question whether *Bombolis* remains good law: at the time of *Bombolis*, it was accepted that "there was some area of procedure that the state could continue to regulate" but, if that area of procedure exists today, it is "*de minimis*" and thus "it may reasonably be doubted whether the Bombolis decision has any continuing authoritativeness beyond its particular facts." Charles A. Wright, *The Law of Federal Courts* § 45, at 272 (4th ed. 1983) ("Wright"). *Dice*, for example, substantially narrowed *Bombolis* in holding that a state was *not* free to take a question of fact away from the jury in a FELA case. *See* Richard H. Fallon, Jr., *et al.*, *Hart & Wechsler's The Federal Courts and The Federal System* 484 (4th ed. 1996) (questioning whether *Bombolis* survives *Dice*).[10]

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[10] *See also* Hill, 17 Ohio St. L.J. at 393 (noting "more recent cases . . . show an increasing tendency to compel the states to

In all events, *Bombolis* is inapposite. The narrow issue in *Bombolis* was whether the Seventh Amendment's guarantee of a jury trial was infringed by a state rule allowing a non-unanimous jury verdict. The Court held that it was not. *See* 241 U.S. at 219. At best, the decision confirms that there are instances in which local rules of procedure may be applied to FELA claims, but nothing in *Bombolis* or the Ohio Supreme Court's analysis suggests why the rules at issue *here* — H.B. 292's threshold evidentiary rules — may be constitutionally applied to FELA claims.

Nor does *Mayfield* support the decision below. *Mayfield* held that *forum non conveniens*, which is "nothing more or less than a supervening venue provision," *American Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994), is a procedural, not a substantive, doctrine. Whatever the proper characterization of *forum non conveniens*, H.B. 292's requirements here burden federal substantive rights. *See supra* pp. 14-18. To the extent the court read *Mayfield* as supporting a uniform safe harbor for all state procedural rules from preemption analysis, it erred.[11]

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conduct jury trials in a manner substantially similar to the jury trials conducted in the federal district courts").

[11] In addition, *Mayfield* is a valid-excuse case. *See Howlett v. Rose*, 496 U.S. 356, 374-75 (1990) (noting *Mayfield* is one of "only three occasions" the Court has found "valid excuse for a state court's refusal to entertain a federal cause of action"). This Court has been clear that "[a]n excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy Clause forbids state courts to disassociate themselves from federal law because of disagreement with its content." *Id.* at 371. It follows that Ohio may not use H.B. 292 as a tool for disassociating state courts from federal FELA asbestos claimants.

b. The practice of an MDL court does not create a safe harbor for H.B. 292

The Ohio Supreme Court also held that the docket practice of the United States District Court for the Eastern District of Pennsylvania supported its conclusion that application of H.B. 292 to FELA claims was not preempted. *See* Pet. App. 14a. But that reasoning is unpersuasive for multiple reasons. Preliminarily, an opinion of a district court carries no weight as a matter of law, and it thus would be extraordinary to construe a single, unreviewed case management order as effectively creating a uniform safe harbor for all states to fetter the exercise of federal rights (especially when it is far from clear whether that court ever considered whether the practice could be applied to FELA claimants).[12]

More importantly, the order is nothing like the threshold evidentiary rules of H.B. 292. Under the order, asbestos claims initiated through a "mass screening" are subject to dismissal. Administrative Order No. 8, *In re Asbestos Prods. Liab. Litig.*, No. MDL 875, 2002 WL 32151574, ¶ 1 (E.D. Pa. Jan. 16, 2002). Any similarities between the order and H.B. 292 end there: under the order, a party may request reinstatement by filing an affidavit "setting forth the facts that qualify the case for active processing," and the affidavit need set forth only "*some evidence* of asbestos exposure and . . . an asbestos-related disease." *Id.* ¶ 3 (emphasis added). Unlike H.B. 292, the order

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[12] *See United States v. Articles of Drug Consisting of 203 Paper Bags*, 818 F.2d 569, 572 (7th Cir. 1987) (Posner, J.) ("A single district court decision . . . (especially one that cannot be appealed)[] has little precedential effect. It is not binding on the circuit, or even on other district judges in the same district.").

does not: define the quantum of evidence required for reinstatement, impose causation and evidentiary requirements stricter than those imposed under substantive law, define with specificity the qualifications of the medical professional that must provide a diagnosis, impose burdens of proof inconsistent with substantive law, or purport to regulate at all the contents of the affidavit.

Beyond those crucial distinctions, the MDL order, unlike H.B. 292, evidences no aim of decreasing asbestos liability for the sake of decreasing asbestos liability. The purpose and effects of H.B. 292 are patently hostile to policy choices made by Congress in enacting the FELA and previously applied by this Court. The Supremacy Clause simply does not tolerate states second-guessing federal policy choices made by Congress in such a manner.[13]

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[13] The Ohio Supreme Court's assertions that H.B. 292 is "neutral" and that the statute imposes a burden "no greater than [a Rule] 11 pleading standard," Pet. App. 12a, are wide of the mark. *Felder*, as well as this Court's FELA precedent, makes clear that neutrality alone does not immunize a rule from preemption. *See Felder*, 487 U.S. at 144-45; *Dice*, 342 U.S. at 362-63; *Brown*, 338 U.S. at 296-99. Furthermore, nothing in Federal Rule of Civil Procedure 11 requires a plaintiff, among other things, to make detailed threshold evidentiary showings that exceed the substantive elements of the cause of action.

II. THE COURT'S REVIEW OF THE OHIO SUPREME COURT'S DECISION IS URGENTLY NEEDED

A. The Decision Below Deepens Confusion Among State High Courts

The decision below substantially deepens confusion in state courts regarding FELA preemption. Certiorari is warranted to resolve that confusion.

1. It is generally settled that, "[w]hen adjudicating FELA cases, a state court is bound by federal substantive law." *Kauzlarich v. Atchison, T. & S.F. Ry.*, 910 S.W.2d 254, 256 (Mo. 1995). On the antecedent questions of under what circumstances a law is substantive or procedural and under what circumstances a law, even if procedural, unduly restricts federal rights, there is a patent absence of uniformity among state high courts.

The South Carolina Supreme Court, for example, has held, in direct conflict with the Ohio Supreme Court here, that issues relating to the sufficiency of evidence and proof are controlled by federal law. *See Haselden v. Atlantic Coast Line R.R.*, 53 S.E.2d 60, 63 (S.C. 1949) (holding in a FELA action that, "[i]n considering the evidence in this case," the court should evaluate sufficiency of evidence "in the light of the Federal decisions interpreting [FELA]"); *see also Montgomery v. CSX Transp., Inc.*, 656 S.E.2d 20, 28 (S.C. 2008) ("general standard of proof" in a FELA action is governed by "federal law"). So, too, has the Texas Supreme Court: "State courts trying FELA claims *must apply federal law about burdens of proof.*" *Union Pac. R.R. v. Williams*, 85 S.W.3d 162, 170 (Tex. 2002) (emphasis added).

In addition, the D.C. Court of Appeals has held that "[f]ederal law controls actions under FELA

in local as well as federal courts," and thus "that questions of *sufficiency of evidence* for the jury in cases arising under the act in state courts are to be determined by federal rules." *McMillan v. National R.R. Passenger Corp.*, 648 A.2d 428, 431 (D.C. 1994) (emphasis added, internal quotations omitted). Also in stark conflict with the decision below — upholding state prima facie evidentiary requirements — the Washington Supreme Court has held that "[t]he federal interest under the [FELA] extends to the determination of the minimum quantum of evidence the plaintiff must adduce to prove a prima facie case." *Adair v. Northern Pac. Ry.*, 392 P.2d 830, 831 (Wash. 1964).

The Missouri Supreme Court has reached similar conclusions. In *Kauzlarich*, the Missouri court faced the question whether a trial court's decision to allow a jury instruction (which was not in a state-approved list of jury instructions) on mitigation of FELA damages was a matter of state or federal law. The court reasoned that the *procedural* question whether to allow the instruction was a federal issue because of its relationship to *substantive* law: "[b]ecause the issue of mitigation of damages in an FELA case is a substantive matter under federal law, the trial court's refusal to allow [the] instruction . . . is at odds with federal law." 910 S.W.2d at 258.

By contrast, a second line of state high courts has held that a conclusion that a rule is procedural is the beginning *and* the end of the inquiry as to whether a rule may be applied to FELA claims. *See Allen v. National R.R. Passenger Corp.*, 934 So. 2d 1006, 1013-16 (Miss. 2006) (finding that it "may be" that, as a matter of federal law, "the evidentiary threshold is quite low for a FELA case to proceed to a jury,"

but holding that a trial court's refusal to allow an issue to go to a jury because of discovery issues was procedural, without assessing burden on FELA rights); *Rule v. Burlington N. & S.F. Ry.*, 106 P.3d 533, 536-37 (Mont. 2005) (holding that venue statute was procedural, without assessing burden on FELA rights); *Alabama Great Southern R.R. v. Jackson*, 587 So. 2d 959, 962 (Ala. 1991) (holding that "standard for reviewing the denial of a motion for a directed verdict" is a matter of state "procedur[e]," without assessing burden on FELA rights).[14]

Finally, other state high courts have held, like the Ohio Supreme Court here, that it is insufficient that a rule is procedural to insulate it from preemption analysis. In doing so, those courts cite the principle that a local rule cannot "lessen[] or destroy[]" a federal right, but then undertake no reasoned or meaningful analysis of the effect of the rule on the exercise of federal rights. *E.g.*, *Gaulden v. Burlington Northern, Inc.*, 654 P.2d 383, 391 (Kan. 1982) (conclusorily stating that application of comparative negligence statute would not "interfere with, lessen, or destroy" FELA rights); *Castro v. Chicago, R.I. & P.R.R.*, 415 N.E.2d 365, 367 (Ill. 1980) (holding that, under FELA, "a Federal substantive right cannot be

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[14] There also is a divide among state high courts and federal courts of appeals regarding whether federal evidentiary principles control. *Compare Brewer v. Denver & Rio Grande Western R.R.*, 31 P.3d 557, 563 n.3 (Utah 2001) (applying state rules to determine admissibility of evidence under FELA without assessing burden on FELA rights), *with Hose v. Chicago Northwestern Transp. Co.*, 70 F.3d 968, 977 n.11 (8th Cir. 1995) (rejecting argument state law governs evidentiary issues in FELA action; "[e]videntiary decisions in FELA cases are clearly a matter of federal law") (citing *Liepelt*, 444 U.S. at 492-93, 494 n.7).

lessened or destroyed by a State rule of procedure," and conclusorily stating no such impairment occurred).

2. The above discussion illustrates that there is longstanding confusion in — and sharp divisions among — state high courts regarding the legal principles that should govern when and if state rules may be applied to defeat FELA claims.

This case presents an ideal opportunity to bring clarity to at least some of the confusion regarding those questions. The issues raised are questions of law that have been fully vetted by a state trial court, appellate court, and high court, and there are no relevant disputes of material fact. Thus, this Court will be able to fashion rules governing FELA preemption on the basis of an undisputed record. Just as significantly, the threshold evidentiary requirements of H.B. 292 restrict FELA plaintiffs' rights through an assortment of rules, including burdens and standards of proof, substantive causation principles, and evidentiary requirements. For that reason, review of the Ohio Supreme Court's decision here would provide an opportunity to provide needed guidance regarding FELA preemption in the context of a wide range of different categories of state rules.

B. The Issues Raised Will Recur And Have Already Divided State High Courts

This Court's review also is needed now as the specific issues raised by the decision below are likely to recur and to create additional divisions among state courts. "[S]tate courts and legislators have accelerated efforts to deal with asbestos litigation." James L. Stengel, *The Asbestos End-Game*, 62 N.Y.U. Ann. Surv. Am. L. 223, 251 (2006). H.B. 292 is a precedent-setting statute in those reform efforts.

Georgia, for one, has "enacted asbestos legislation which is similar to H.B. 292."[15]

Indeed, the decision below substantially conflicts with the Georgia Supreme Court's review of the Georgia statute. In *Daimler Chrysler Corp. v. Ferrante*, 637 S.E.2d 659 (Ga. 2006), the Georgia court — though not adjudicating a preemption challenge, as the claims arose under state law — held that the statute's threshold evidentiary rules impose *substantive* burdens for the purpose of retroactivity analysis. The court reasoned that, prior to the statute's enactment, "a plaintiff was required to show only that exposure to asbestos was a *contributing* factor in his or her medical condition." *Id.* at 661. The statute, "by introducing the requirement that asbestos plaintiffs present prima facie evidence that asbestos was a *substantial* contributing factor to their medical condition, . . . imposes . . . a greater evidentiary burden than was required under the law in effect at the time" the claims were filed. *Id.* In conflict with the Ohio court, the Georgia court explained that "it makes no relevant difference that the Act does not alter [plaintiffs'] burden of proof at trial because regardless of when it must be shown, the Act makes proof that asbestos exposure was a substantial contributing factor *an essential element of an asbestos claim.*" *Id.* (emphasis added). For that reason, the statute affected "substantive rights." *Id.*

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[15] Presentation to Annual National Silica Litigation Conference, *Federal Preemption and State Imposed Medical Criteria in Asbestos and Silica Personal Injury Cases* 6 (Sept. 2006) ("*Preemption Presentation*"), *available at* http://www.gsfn.com/useful_tools/Silica2006-Handout.pdf.

Apart from Georgia, at least two other states have adopted statutes similar to H.B. 292.[16] Multiple other states, "including Kansas, South Carolina, Tennessee, Kentucky, Louisiana, Michigan, Missouri, New York, Pennsylvania, California, Virginia and West Virginia[,] have either pending or introduced" asbestos legislation that is "similar" to H.B. 292.[17] The Ohio Supreme Court's decision — affirming the right of a state to burden federal claimants in an effort to reform asbestos litigation — undoubtedly will serve as a bellwether for other states contemplating whether to restrict remedies afforded by federal law. *See* Mark A. Behrens & Andrew W. Crouse, *The Evolving Civil Justice Reform Movement*, 31 U. Dayton L. Rev. 173, 198 (2006) ("latest trend" is to follow Ohio approach to asbestos reform, and "[t]he number of states that consider medical criteria legislation will no doubt continue as more states explore solutions to address asbestos . . . litigation").

In short, the central issue raised in this case — whether states may burden the exercise of federal rights in an effort to manage asbestos litigation — is certain to recur and likely to deepen an existing conflict among state high courts. This Court should grant certiorari to make clear that, whatever the policy merits of state reform and however states wish to alter state-law claims, the Supremacy Clause precludes states from impeding the exercise of federal rights in pursuing those ends. *See Ayers*, 538 U.S. at 166; *Felder*, 487 U.S. at 143.

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[16] *See* Fla. Stat. Ann. §§ 774.201-774.209; Tex. Civ. Prac. & Rem. Code Ann. §§ 90.001-90.012.

[17] *Preemption Presentation* at 6.

C. The Decision Below Burdens Federal Rights And Creates An Immediate Lack Of Uniformity That Warrants Review

Finally, certiorari is warranted to remedy the disparity created by the decision below. Over the last century, this Court has regularly granted certiorari to review state court interpretations of the FELA. This Court's readiness to review such decisions reflects the weighty national interests served by the FELA as well as the imperative of uniformity that Congress has assigned to application of the statute. *See, e.g., Winfield*, 244 U.S. at 149 (issues regulated by FELA "are matters in which the nation as a whole is interested, and there are weighty considerations why the controlling law should be uniform and not change at every state line"). As this Court explained in *Brown*, certiorari was warranted "because the implications of the dismissal [of FELA claims] were considered important to a correct and uniform application of the federal act in the state and federal court." 338 U.S. at 295; *see also* Wright § 45, at 272 ("[T]he Supreme Court has been astute to protect the rights of FELA plaintiffs.").

Those considerations compel certiorari here. The decision below creates an immediate lack of uniformity in application of an important federal statute: the burdens facing railroad workers bringing suit in Ohio are now materially different from those facing workers bringing suit in other states or in federal court. Only this Court is positioned to remedy that disparity. Given the powerful interest in uniformity embodied in the FELA, this Court should resolve that disparity now. *See Dice*, 342 U.S. at 361 (granting certiorari to review Ohio Supreme Court FELA decision that "appeared to deviate from previous

decisions of this Court that federal law governs cases arising under the [FELA]").

In other contexts, this Court has been resolute to guard against individual (and idiosyncratic) state and local laws that burden federal interests, even in the absence of express conflicts. *See, e.g., Rice v. Cayetano*, 528 U.S. 495, 498-511 (2000) (granting certiorari to resolve constitutionality of unique Hawaii statute that burdened Fifteenth Amendment rights without discussion of conflict); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 389-90 (1994) (granting certiorari to review local ordinance that unduly burdened interstate commerce without discussion of conflict); *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 339 (1992) (granting certiorari to review whether state statute that imposed fee on hazardous waste violated Commerce Clause "[b]ecause of the importance of the federal question and the likelihood that it had been decided in a way conflicting with applicable decisions of this Court"). Given the significance of the FELA and the congressional interest in uniformity underlying the statute, the same result is called for here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CHRISTOPHER J. HICKEY
MARY BRIGID SWEENEY
BRENT COON AND
ASSOCIATES
1220 West Sixth Street
Suite 303
Cleveland, Ohio 44113
(216) 241-1872

DAVID C. FREDERICK
Counsel of Record
KELLY P. DUNBAR
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Petitioners

March 11, 2008

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SUPREME COURT OF OHIO

No. 2006-1025

NORFOLK SOUTHERN RAILWAY COMPANY,
Appellant,

v.

HOMER R. BOGLE, ET AL.,
Appellees.

Appeal from the Court of Appeals
for Cuyahoga County (No. 86339)

Submitted May 1, 2007
Decided October 10, 2007

O'DONNELL, J.

{¶ 1} The central issue presented for our consideration concerns whether the application of the prima facie filing requirements of 2003 Am.Sub.H.B. 292 ("H.B. 292"), as codified in R.C. 2307.92, to asbestos claims arising out of the Federal Employers' Liability Act ("FELA") or the Locomotive Boiler Inspection Act ("LBIA") infringes upon the Supremacy Clause of the United States Constitution and therefore is preempted by federal law. For the reasons that follow, we have concluded that the appellate court erred in finding preemption, and therefore, we reverse the judgment of the court of appeals.

{¶ 2} Based on its belief that "[t]he current asbestos personal injury litigation system is unfair and inefficient, imposing a severe burden on litigants and taxpayers alike," the General Assembly enacted H.B. 292. H.B. 292, Section 3(A)(2), 150 Ohio Laws, Part III, 3970, 3988. By the end of 2000, "over six hundred thousand people [had] filed asbestos claims" nationwide, and Ohio had "become a haven for asbestos claims and, as a result, is one of the top five state court venues for asbestos filings." Id. at Section 3(A)(3)(a) and (b), 150 Ohio Laws, Part III, 3989. The General Assembly further noted that in Cuyahoga County alone, the asbestos docket increased from approximately 12,800 cases in 1999 to over 39,000 cases by October 2003. Id. at Section 3(A)(3)(e), 150 Ohio Laws, Part III, 3989. Eighty-nine percent of claimants do not allege that they suffer from cancer, and "[s]ixty-six to ninety per cent of these non-cancer claimants are not sick." Id. at Section 3(A)(5), 150 Ohio Laws, Part III, 3990.

{¶ 3} Upon these considerations, the General Assembly enacted R.C. 2307.91 through 2307.98 to serve four primary purposes: (1) to give priority to those claimants who can demonstrate actual physical harm caused by asbestos, (2) to preserve the rights of those who were exposed for future action, (3) to enhance the state's system of supervision and control over asbestos-related litigation, and (4) to conserve the scarce resources of the defendants so as to allow compensation for cancer victims while also securing a right to similar compensation for those who suffer harm in the future. Id. at Section 3(B), 150 Ohio Laws, Part III, 3991.

{¶ 4} At issue here are R.C. 2307.92 and 2307.93. R.C. 2307.92(B) provides, "No person shall bring or maintain a tort action alleging an asbestos claim based on a nonmalignant condition in the absence of a prima-facie showing" of physical injury caused by asbestos exposure. The prima facie showing requires the claimant to submit a report containing medical findings and to include a demonstration "that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is a substantial contributing factor to the medical condition." Id. The statute also contains prima facie filing requirements for asbestos claimants who bring a wrongful-death action, and for claimants who are smokers suffering from lung cancer. R.C. 2307.92(C) and (D).

{¶ 5} In cases filed after the effective date of the legislation, a claimant has 30 days after initiating the action to comply with these prima facie requirements. R.C. 2307.93(A)(1). In cases pending at the time of the bill's passing – such as those in the instant matter – claimants have 120 days from the effective date to comply. R.C. 2307.93(A)(2). Failure to file the report results in administrative dismissal, a procedure by which the case is essentially rendered inactive, but the court retains jurisdiction over the matter. R.C. 2307.93(C). A claimant may move to reinstate the case to the active docket if the claimant "makes a prima-facie showing that meets the minimum requirements specified in division (B), (C), or (D) section 2307.92 of the Revised Code." Id.

The Supremacy Clause and Preemption

{¶ 6} The Supremacy Clause of the United States Constitution provides that "the Laws of the United

States * * * shall be the supreme Law of the Land; * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Clause 2, Article VI, United States Constitution. The clause grants Congress the power to preempt state laws. See *Jenkins v. James B. Day & Co.* (1994), 69 Ohio St.3d 541, 544, 634 N.E.2d 998, citing *In re Miamisburg Train Derailment Litigation* (1994), 68 Ohio St.3d 255, 259, 626 N.E.2d 85.

{¶ 7} The United States Supreme Court has identified three methods by which Congress may preempt state legislation. First, it may expressly state that an enactment preempts applicable state law. *Shaw v. Delta Air Lines, Inc.* (1983), 463 U.S. 85, 95-98, 103 S.Ct. 2890, 77 L.Ed.2d 490. Second, Congress may preempt an entire field of activity, without expressly stating its intention to do so, if an intent to preempt can be inferred "from a 'scheme of federal regulation * * * so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' or where an Act of Congress 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" (Ellipsis and brackets sic.) *English v. Gen. Elec. Co.* (1990), 496 U.S. 72, 79, 110 S.Ct. 2270, 110 L.Ed.2d 65, quoting *Rice v. Santa Fe Elevator Corp.* (1947), 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447. Finally, Congress preempts state law when a state law actually conflicts with a federal law, i.e., "where it is impossible for a private party to comply with both state and federal requirements." *English*, 496 U.S. at 78-79, 110 S.Ct. 2270, 110 L.Ed.2d 65.

{¶ 8} This case involves field preemption, as Congress "intended to occupy the field" when it passed

the FELA, Section 51, Title 45, U.S.Code and LBIA, Section 20701, Title 49, U.S.Code. *Napier v. Atlantic Coast Line RR. Co.* (1926), 272 U.S. 605, 613, 47 S.Ct. 207, 71 L.Ed. 432. Despite the preemption of substantive state regulation, however, the court has instructed that "FELA cases adjudicated in state courts are subject to state procedural rules." *St. Louis Southwestern Ry. Co. v. Dickerson* (1985), 470 U.S. 409, 411, 105 S.Ct. 1347, 84 L.Ed.2d 303. State procedural rules therefore govern FELA claims in state court.

{¶ 9} In this instance, the FELA creates a claim based upon, inter alia, a violation of the LBIA. The LBIA "does not purport to confer any right of action upon injured employees. It merely makes violation of its prohibitions 'unlawful.' Yet it has been held consistently that the Boiler Inspection Act supplements the Federal Employers' Liability Act by imposing on interstate railroads 'an absolute and continuing duty' to provide safe equipment." *Urie v. Thompson* (1949), 337 U.S. 163, 188, 69 S.Ct. 1018, 93 L.Ed. 1282, quoting *Lilly v. Grand Trunk W. RR. Co.* (1943), 317 U.S. 481, 485, 63 S.Ct. 347, 87 L.Ed. 411.

Procedural History

{¶ 10} This case began when four claimants, Homer Bogle, Charles Weldon, William Monroe, the administrator of the estate of Worth Oliver Bryant, deceased, and Eric Wiles, individually and in his capacity as executor of the estate of Larry Wiles, filed separate suits against Norfolk Southern Railway Company alleging asbestos-related injuries under the LBIA and seeking relief pursuant to the FELA. After the claimants filed suit, the General Assembly enacted H.B. 292, which required claimants with cases pending at the time of enactment to comply with its

provisions requiring a medical report as described in the statute. The claimants, however, failed to comply with these requirements within the prescribed 120-day time period.

{¶ 11} In response to their failure, Norfolk filed this action seeking a declaration that R.C. 2307.92 applies to these claimants and that its requirements do not violate the Supremacy Clause of the United States Constitution. The trial court concluded that the requirements violated the Supremacy Clause because substantive rights created by federal statute – in this case the FELA and LBIA – "cannot be lessened or destroyed by a rule of practice." *Norfolk S. RR. Co. v. Ferebee* (1915), 238 U.S. 269, 273, 35 S.Ct. 781, 59 L.Ed. 1303. In the trial court's view, "application of H.B. 292 to the instant cases is preempted by the FELA and LBIA. Furthermore, all pending and future FELA/LBIA cases filed by plaintiffs pursuant to R.C. § 2307.93, et seq., are preempted by that extensive body of federal jurisprudence."

{¶ 12} Norfolk appealed that determination to the Cuyahoga County Court of Appeals. The appellate court affirmed the trial court's judgment, reasoning that the requirements of R.C. 2307.92 "would 'gnaw' at the FELA/LBIA claimants' substantive rights to assert a cause of action under federal law in a state court" and that the claimants "would essentially be indefinitely precluded from asserting their federal rights." *Norfolk S. Ry. v. Bogle*, 166 Ohio App.3d 449, 2006-Ohio-1540, 850 N.E.2d 1281, ¶ 26. The appellate court held that the application of the statute to asbestos claims arising under the FELA and/or the LBIA infringes on the Supremacy Clause of the United States Constitution and thus is preempted by federal law. Id. at ¶ 30.

{¶ 13} The case is now before this court upon our acceptance of Norfolk's discretionary appeal.

{¶ 14} Norfolk has asserted one proposition of law: "The medical criteria and the administrative dismissal process set forth in R.C. 2307.92 and R.C. 2307.93 are procedural and not substantive and are thus applicable to asbestos-related FELA/LBIA claims filed in state court without offending the Supremacy Clause of the United States Constitution or the doctrine of federal preemption."

{¶ 15} Norfolk urges that these statutes establish procedural rules that do not affect substantive federal rights and that the prima facie filing requirements mirror those established in the federal courts themselves. Thus, in Norfolk's view, these procedural statutory requirements do not infringe on the field of locomotive safety that Congress has preempted. The claimants have not filed a merit brief in this case and, therefore, did not argue before this court.

The Burden on FELA Claimants

{¶ 16} We initially consider whether the prima facie filing requirements are substantive or procedural in nature, as the FELA/LBIA preempts all substantive state law in the field. In *Jones v. Erie RR. Co.* (1922), 106 Ohio St. 408, 412, 140 N.E. 366, we stated that substantive laws or rules are those that "relate[] to rights and duties which give rise to a cause of action." By contrast, procedural rules concern "the machinery for carrying on the suit." Id. A review of the statutes reveals that they do not grant a right or impose a duty that "give[s] rise to a cause of action." Id. Instead, the impact of these statutes is to establish a procedural prioritization of the asbestos-related cases on the court's docket.

Nothing more. Simply put, these statutes create a procedure to prioritize the administration and resolution of a cause of action that already exists. No new substantive burdens are placed on claimants, because Civ.R. 11 requires a party to certify, by signing a complaint, that there are "good ground[s] to support it."

{¶ 17} In this context, we observe generally that the FELA applies to all railroad common carriers and their employees. To recover for an injury, an employee must prove that the injury occurred in the course of employment, that the railroad was engaged in interstate commerce at the time of the injury, and that the injury resulted in whole or in part from the railroad's negligence. See *Norfolk & W. Ry. v. Ayers* (2003), 538 U.S. 135, 160, 123 S.Ct. 1210, 155 L.Ed. 2d 261. That burden remains unchanged following enactment of R.C. 2307.92 and 2307.93. Thus, the provisions of the statutes do not relate to the rights and duties that give rise to this cause of action or otherwise make it more difficult for a claimant to succeed on the merits of a claim. Rather, they pertain to the machinery for carrying on a suit. They are therefore procedural in nature, not substantive.

{¶ 18} This conclusion, however, does not end our analysis, because procedural rules apply to federal claims only so long as they do not operate to impair a claimant's ability to enforce a federal right or cause of action. *Davis v. Wechsler* (1923), 263 U.S. 22, 24, 44 S.Ct. 13, 68 L.Ed. 143. Accordingly, "[s]trict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws." *Brown v. W. Ry. of Alabama* (1949), 338 U.S. 294, 298, 70 S.Ct. 105, 94 L.Ed. 100. The prime consideration, therefore, is whether the proce-

dural provisions impose an unnecessary burden on FELA claimants.

{¶ 19} Several decisions of the United States Supreme Court support the position that the application of the prima facie filing requirements does not impose an unnecessary burden on a federal right and therefore does not violate the Supremacy Clause. In *Minneapolis & St. Louis RR. Co. v. Bombolis* (1916), 241 U.S. 211, 36 S.Ct. 595, 60 L.Ed. 961, the court upheld a Minnesota provision relaxing the requirement of a unanimous verdict in an FELA case. Bombolis had filed a wrongful-death suit in a Minnesota state court alleging a violation of the FELA. Id. at 215, 36 S.Ct. 595, 60 L.Ed. 961. A Minnesota law provided that when a civil case had been submitted to a jury for at least 12 hours with no unanimous verdict, "five sixths of the jury are authorized to reach a verdict, which is entitled to the legal effect of a unanimous verdict at common law." Id. at 216, 36 S.Ct. 595, 60 L.Ed. 961. The railroad objected to this procedure, urging that the federal nature of the FELA claim required application of the Seventh Amendment, which the court noted "exacts a trial by jury according to the course of the common law, that is, by a unanimous verdict." Id., citing *Am. Publishing Co. v. Fisher* (1897), 166 U.S. 464, 17 S.Ct. 618, 41 L.Ed. 1079.

{¶ 20} Despite the federal claim at issue, the court rejected the application of the Seventh Amendment to a state court proceeding, reasoning that Congress "clearly contemplate[d] the existence of a concurrent power and duty of both Federal and state courts to administer the rights conferred by the statute in accordance with the modes of procedure prevailing in such courts." *Bombolis*, 241 U.S. at 218, 36 S.Ct.

595, 60 L.Ed. 961. Although the decision focused on the Seventh Amendment, the court also considered the broader effects of the "dual constitutional system of government," of which the Supremacy Clause is a crucial component. Id. at 221, 36 S.Ct. 595, 60 L.Ed. 961. Requiring a state court to use a federal procedural standard would, in the court's view, undermine the independent nature of the sovereign: "whether [courts] should be considered as state or as Federal courts would from day to day depend not upon the character and source of the authority with which they were endowed by the government creating them, but upon the mere subject-matter of the controversy which they were considering." Id.

{¶ 21} The United States Supreme Court has also held that whether the doctrine of forum non conveniens applies to FELA cases in state court is a matter for the forum state. *Missouri ex rel. S. Ry. Co. v. Mayfield* (1950), 340 U.S. 1, 4, 71 S.Ct. 1, 95 L.Ed. 3. In *Mayfield*, the court determined that states could employ the doctrine of forum non conveniens so long as the application did not work to discriminate against federal claims, reasoning that nothing in the FELA "purported 'to force a duty' upon the State courts to entertain or retain Federal Employers' Liability litigation 'against an otherwise valid excuse.'" Id. at 5, 71 S.Ct. 1, 95 L.Ed. 3, quoting *Douglas v. New York, New Haven & Hartford RR. Co.* (1929), 279 U.S. 377, 388, 49 S.Ct. 355, 73 L.Ed. 747.

{¶ 22} In more recent decisions, the United States Supreme Court has upheld other state court procedural rules that differ from those in place in the federal courts. In *Johnson v. Fankell* (1997), 520 U.S. 911, 915, 117 S.Ct. 1800, 138 L.Ed.2d 108, the court held that a defendant in an action brought in state

court pursuant to Section 1983, Title 42, U.S.Code had no federal right to an interlocutory appeal from the denial of qualified immunity, even though denial constituted a final order for actions in federal court under Section 1291, Title 28, U.S.Code and *Mitchell v. Forsyth* (1985), 472 U.S. 511, 524-530, 105 S.Ct. 2806, 86 L.Ed.2d 411. The court has reasoned, "'The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them * * *. Some differences in remedy *and procedure* are inescapable if the different governments are to retain a measure of independence in deciding how justice should be administered.'" (Emphasis added and ellipsis sic.) *Southland Corp. v. Keating* (1984), 465 U.S. 1, 33, 104 S.Ct. 852, 79 L.Ed.2d 1, quoting Hart, The Relations Between State & Federal Law (1954), 54 Col.L.Rev. 489, 508. Furthermore, the court has declared that "[w]hen a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts," it will act "'with utmost caution before deciding that [the state court] is obligated to entertain the claim.'" *Johnson*, 520 U.S. at 918, 117 S.Ct. 1800, 138 L.Ed.2d 108, quoting *Howlett v. Rose* (1990), 496 U.S. 356, 372, 110 S.Ct. 2430, 110 L.Ed.2d 332. "States may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law." *Howlett*, 496 U.S. at 372, 110 S.Ct. 2430, 110 L.Ed.2d 332.

{¶ 23} And in *Am. Dredging Co. v. Miller* (1994), 510 U.S. 443, 114 S.Ct. 981, 127 L.Ed.2d 285, the court extended the reasoning of *Mayfield* to maritime actions brought pursuant to the federal Jones Act. In reaching its holding, the court emphasized that the doctrine of forum non conveniens "does not bear upon

the substantive right to recover, and is not a rule upon which * * * actors rely in making decisions about primary conduct – how to manage their business and what precautions to take." Id. at 454, 114 S.Ct. 981, 127 L.Ed.2d 285.

{¶ 24} In the instant case, R.C. 2307.92 and 2307.93 are "neutral state Rule[s] regarding the administration of the state courts," *Johnson*, 520 U.S. at 918, 117 S.Ct 1800, 138 L.Ed.2d 108, that do "not bear upon the substantive right to recover," *Miller*, 510 U.S. at 454, 114 S.Ct. 981, 127 L.Ed.2d 285. The burden imposed is no greater than the Civ.R. 11 pleading standard established and followed throughout this state. The statute simply permits the court to prioritize claims for trial purposes.

{¶ 25} In holding that the LBIA preempted the application of these statutes, the court of appeals relied on *Brown v. W. Ry. of Alabama* (1949), 338 U.S. 294, 295, 70 S.Ct. 105, 94 L.Ed. 100. In *Brown*, the court invalidated a Georgia rule of practice that required a trial court to construe the allegations in a complaint "'most strongly against the pleader'" when considering a motion to dismiss. Id. at 295, 70 S.Ct. 105, 94 L.Ed. 100, quoting *Brown v. W. Ry. of Alabama* (1948), 77 Ga.App. 780, 49 S.E.2d 833, syllabus. The application of this rule of practice to Brown's FELA claim resulted in a dismissal of the matter with prejudice, precluding future recovery. Id. Citing its desire for uniformity in adjudication of federal claims, the court emphasized its duty "to protect federally created rights from dismissal because of overexacting local requirements for meticulous pleadings." Id. at 299, 70 S.Ct. 105, 94 L.Ed. 100.

{¶ 26} *Brown* is distinguishable in two respects.

{¶ 27} First, the Georgia rule of practice had no similar federal counterpart. The federal rule, later embodied in *Conley v. Gibson* (1957), 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80, had long required a trial court to deny motions to dismiss unless it "'appear[ed] from the allegations that a cause of action does not exist, rather than that a cause of action has been defectively stated.'" *Leimer v. State Mut. Life Assur. Co.* (C.A.8, 1940), 108 F.2d 302, 305, quoting *Winget v. Rockwood* (C.A.8, 1934), 69 F.2d 326, 329. The Georgia standard, therefore, was antithetical to that used in the federal courts. More important, the Georgia standard precluded recovery in a state court despite the fact that Brown's complaint would have easily withstood scrutiny in a federal forum.

{¶ 28} Second, the Georgia rule of practice functioned as a dismissal with prejudice, while in the instant case, failure to comply with the prima facie filing requirements carries no such penalty. A claimant who fails to comply with these requirements faces administrative dismissal *without* prejudice, and the case effectively becomes "inactive" for purposes of discovery and trial. R.C. 2307.93(C). Moreover, the statutes toll the limitations period and permit a claimant to reinstate the matter upon a showing of the requisite injury. Id. For these reasons, R.C. 2307.92 and 2307.93 do not impose the same degree of burden on a party asserting a federal claim in state court as the rule of practice at issue in *Brown* does, and the court of appeals erred in holding the statute unconstitutional on this basis.

{¶ 29} We therefore hold that the prima facie filing requirements of R.C. 2307.92 are procedural in nature, and their application to claims brought in state court pursuant to the FELA and the LBIA does

not violate the Supremacy Clause, because the provisions do not impose an unnecessary burden on a federally created right.

{¶ 30} Our conclusion that the procedural statute at issue does not impose an unnecessary burden on a federal right is fortified by the fact that the federal courts themselves have responded to the growth of asbestos litigation by initiating a similar method to prioritize asbestos-related cases. Beginning in 1991, the Judicial Panel for Multidistrict Litigation transferred 26,639 asbestos-related cases from federal district courts into one forum. *In re Asbestos Prods. Liability Litigation* (1991), 771 F.Supp. 415. To accommodate the ever-growing docket, the District Court for the Eastern District of Pennsylvania established a screening process regarding nonmalignant asbestos-related injuries through the use of a pretrial order. *In re Asbestos Prods. Liability Litigation* (Sept. 16, 1996), E.D.Pa. No. MDL 875, 1996 WL 539589, *1. For example, Administrative Order No. 8 applies to all asbestos claimants that file a complaint "without a doctor-patient medical report setting forth an asbestos related disease." *In re Asbestos Prods. Liability Litigation* (Jan. 16, 2002), E.D.Pa. No. 875, 2002 WL 32151574, *1. Claims without this documentation "shall be subject to administrative dismissal without prejudice and with the tolling of all applicable statutes of limitations." Id. Furthermore, after administrative dismissal of a case, a claimant may move to reinstate the case by submitting "an affidavit setting forth the facts that qualify the case for active processing," with the claimant bearing the burden to show "some evidence of asbestos exposure and evidence of an asbestos-related disease." Id. at *2.

{¶ 31} While the provisions of the statutes at issue are more specific than those enunciated in Administrative Order No. 8, the effect and purpose are generally the same. The Supremacy Clause does not require states to employ procedures identical to those in the federal courts, as long the procedures in question involve neutral rules regarding the administration of the courts. The statutes are procedural in nature, apply to all asbestos claims filed in Ohio regardless of the theory or statutory basis giving rise to relief, and serve to make efficient use of judicial resources.

{¶ 32} We therefore reverse the decision of the court of appeals and remand this cause for further proceedings.

Judgment reversed.

LUNDBERG STRATTON, O'CONNOR, LANZINGER, and CUPP, JJ., concur.

MOYER, C.J., and PFEIFER, J., dissent.

PFEIFER, J., dissenting.

{¶ 33} I disagree with the majority opinion's conclusion that R.C. 2307.92 does "not impose an unnecessary burden on a federally created right." The majority opinion states that "the impact of [R.C 2307.92] is to establish a procedural prioritization of the asbestos-related cases on the court's docket. Nothing more." I believe, to the contrary, that "[t]he new Ohio requirement precludes the [Federal Employers' Liability Act/Locomotive Boiler Inspection Act ('FELA/LBIA')] claimants from proceeding on their claims until filing the report satisfying the requirements of R.C. 2307.92 et seq. * * * [T]his requirement would 'gnaw' at the FELA/LBIA claim-

ants' substantive rights to assert a cause of action under federal law in a state court." *Norfolk S. Ry. Co. v. Bogle*, 166 Ohio App.3d 449, 2006-Ohio-1540, 850 N.E.2d 1281, ¶ 26. I believe that FELA and LBIA preempt R.C. 2307.92. I dissent.

MOYER, C.J., concurs in the foregoing opinion.

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT, CUYAHOGA COUNTY

No. 86339

NORFOLK SOUTHERN RAILWAY COMPANY,
Appellant,

v.

HOMER R. BOGLE, ET AL.,
Appellees.

Decided March 30, 2006

COLLEEN CONWAY COONEY, Presiding Judge.

{¶ 1} Plaintiff-appellant, Norfolk Southern Railway Company ("Norfolk"), appeals the trial court's decision denying its request for declaratory relief and finding that Am.Sub.H.B. No. 292 ("H.B. 292") is preempted by the Federal Employer's Liability Act ("FELA"), Section 51 et seq., Title 45, U.S.Code, and/or the Locomotive Boiler Inspection Act ("LBIA"), as amended, Section 20701 et seq., Title 49, U.S. Code. Finding no merit to the appeal, we affirm.

{¶ 2} Between September 1999 and March 2004, defendants-appellees, Charles Odell Weldon and Eric A. Wiles, individually and in his capacity as executor of the estate of Larry Arnold Wiles, deceased (collectively "appellees"), filed claims against Norfolk alleging injuries caused by occupational exposure to various products, including those containing asbestos, during the course and scope of their employment

with Norfolk.[1] Appellees brought these causes of action under the FELA and LBIA.

{¶ 3} On September 13, 2004, Norfolk filed a complaint for declaratory judgment concerning the above pending cases. Norfolk requested a declaratory judgment to declare that (1) the newly enacted H.B. 292, effective September 2, 2004, applied to those pending cases, and (2) that H.B. 292 did not infringe on the Supremacy Clause of the United States Constitution.

{¶ 4} Following various procedural motions and an oral hearing, the trial court denied the relief sought by Norfolk by declaring that H.B. 292 did not apply to FELA/LBIA cases because it was preempted by federal law.

{¶ 5} Norfolk appeals this decision, raising three assignments of error, which will be addressed together.

Standard of Review

{¶ 6} The issue before us is whether the application of H.B. 292 to asbestos claims arising under the FELA and/or LBIA infringes on the Supremacy Clause of the United States Constitution and thus is preempted by federal law. This issue is a question of law. Accordingly, we apply a de novo standard of review without deference to the trial court's decision on this issue. *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835; *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1996), 76 Ohio St.3d 521, 523, 668 N.E.2d 889.

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[1] Defendants-appellees, Homer Bogle and William H. Monroe Jr., as administrator of the estate of Worth Oliver Bryant, were voluntarily dismissed from this appeal.

H.B. 292: Applicability to the FELA and/or LBIA

{¶ 7} In its first and second assignments of error, Norfolk argues that the trial court erred as a matter of law by declaring that H.B. 292 ("the Act") does not apply to asbestos claims arising under the FELA and/or LBIA because the plain language of the Act demonstrates that it was intended to apply to all asbestos cases filed in the state courts of Ohio. It further argues that the Act is procedural in application, rather than substantive, and, thus, it does not infringe on the Supremacy Clause and is not preempted by federal law.

{¶ 8} In construing a statute, a court's paramount concern is the legislative intent in enacting the statute. *State v. S.R.* (1992), 63 Ohio St.3d 590, 594, 589 N.E.2d 1319. To determine the legislative intent, a court must look to the language of the statute. *Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, 104, 65 O.O.2d 296, 304 N.E.2d 378. Words used in a statute are to be given their usual, normal, and customary meaning. *State ex rel. Pennington v. Gundler* (1996), 75 Ohio St.3d 171, 173, 661 N.E.2d 1049. Further, unless a statute is ambiguous, the court must give effect to the plain meaning of a statute. Id.

{¶ 9} The preemption doctrine arises out of the Supremacy Clause of the United States Constitution, which provides that the laws of the United States shall be "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Article VI, United States Constitution. Therefore, pursuant to the Supremacy Clause, Congress possesses the power to preempt state law. *Minton v. Honda of Am. Mfg., Inc.* (1997),

80 Ohio St.3d 62, 68, 684 N.E.2d 648. Moreover, "'pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.'" Id., quoting *In re Miamisburg Train Derailment Litigation* (1994), 68 Ohio St.3d 255, 260, 626 N.E.2d 85.

{¶ 10} Federal preemption of state law can occur where Congress has occupied the entire field (field preemption) or where there is an actual conflict between federal and state law (conflict preemption). *Carter v. Consol. Rail Corp.* (1998), 126 Ohio App.3d 177, 181, 709 N.E.2d 1235. Field and conflict preemption are both forms of implied preemption. Id., citing *Minton*, 80 Ohio St.3d at 69, 684 N.E.2d 648.

{¶ 11} Absent express statutory language preempting state law, preemption should be strictly construed in favor of finding against preemption. "In the interest of avoiding unintended encroachment on the authority of the States * * *, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find preemption." *CSX Transp., Inc. v. Easterwood* (1993), 507 U.S. 658, 663-664, 113 S.Ct. 1732, 123 L.Ed.2d 387. The critical question in any preemption analysis is whether Congress intended state law to be superseded by federal law. *Minton*, 80 Ohio St.3d at 69, 684 N.E.2d 648.

{¶ 12} However, when the federal government completely occupies a given field or an identifiable portion of it, the test of preemption is whether "'the matter on which the state asserts the right to act is in any way regulated by the Federal Act.'" *Carter*, 126 Ohio App.3d at 182, 709 N.E.2d 1235, quoting *Burlington N. RR. Co. v. Connell* (E.D.Wash.1993),

811 F.Supp. 1459, 1465. See, also, *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm.* (1983), 461 U.S. 190, 212-213, 103 S.Ct. 1713, 75 L.Ed.2d 752.

{¶ 13} In the seminal case of *Napier v. Atlantic Coast Line RR. Co.* (1926), 272 U.S. 605, 613, 47 S. Ct. 207, 71 L.Ed. 432, the United States Supreme Court held that Congress, through the LBIA, intended the federal government to occupy the field of locomotive safety. The LBIA was enacted to protect employees and the traveling public from defective locomotive equipment. *Urie v. Thompson* (1949), 337 U.S. 163, 188, 190-191, 69 S.Ct. 1018, 93 L.Ed. 1282. The LBIA imposes an absolute duty on interstate railroads to provide safe equipment and subjects railroads to FELA suits by their employees for LBIA violations. Id. at 189, 69 S.Ct. 1018, 93 L.Ed. 1282.

{¶ 14} Addressing the breadth of the federal government's authority under the LBIA, the Supreme Court found it extended "to the design, the construction and the material of every part of the locomotive and tender and all appurtenances." *Seaman v. A.P. Green Industries* (2000), 184 Misc.2d 603, 604, 707 N.Y.S.2d 299, quoting *Napier*, 272 U.S. at 611, 47 S. Ct. 207, 71 L.Ed. 432. The field preemption of the LBIA applies not only to state legislative regulation, but also to state tort claims. Id., at 605, 707 N.Y.S.2d 299. The LBIA preempts any state law that regulates locomotive equipment because the LBIA was enacted with the congressional intent to occupy the field of locomotive equipment and safety, particularly as it relates to injuries suffered by railroad workers in the course of their employment. *Law v. Gen. Motors Corp.* (C.A.9, 1997), 114 F.3d 908, 910.

{¶ 15} Ohio and other jurisdictions have held that the LBIA preempts state tort actions brought by railroad employees injured by exposure to asbestos-containing locomotive components against railway companies and manufacturers. *Darby v. A-Best Products Co.*, 102 Ohio St.3d 410, 2004-Ohio-3720, 811 N.E.2d 1117; *Seaman*, supra; *Scheiding v. Gen. Motors Corp.* (2000), 22 Cal.4th 471, 93 Cal.Rptr.2d 342, 993 P.2d 996; *In re West Virginia Asbestos Litigation* (2003), 215 W.Va. 39, 592 S.E.2d 818. Therefore, the FELA and/or the LBIA entirely preempts the field of locomotive safety and bars state tort claims, including those related to asbestos injuries.

{¶ 16} When field preemption has been found, there is no need for legislative intent specifically directed at tort law, product-liability claims, or any other particular type of state regulation. *Carter*, 126 Ohio App.3d at 183, 709 N.E.2d 1235. When state law is preempted, the claims that depend on it are necessarily precluded. Id., citing *Napier*, 272 U.S. at 613, 47 S.Ct. 207, 71 L.Ed. 432. Therefore, it is not required that the General Assembly expressly exclude or include FELA and/or LBIA claims from the Act, because those claims are necessarily precluded.

{¶ 17} Instead of state tort claims, injured railroad workers asserting injury under the LBIA must bring their claims under the FELA. *Seaman*, 184 Misc.2d at 605, 707 N.Y.S.2d 299, citing *Wabash R. Co. v. Hayes* (1914), 234 U.S. 86, 34 S.Ct. 729, 58 L.Ed. 1226. "Whether a locomotive is off-line in a repair shop or moving interstate, the LBIA preempts state tort law, and the FELA replaces it in the railroad workplace environment." *Darby v. A-Best Products Co.*, Cuyahoga App. No. 81270, 2002-Ohio-7070, 2002

WL 31839197, affirmed, 102 Ohio St.3d 410, 2004-Ohio-3720, 811 N.E.2d 1117.

{¶ 18} "One of the purposes of the FELA was to 'create uniformity throughout the Union' with respect to railroads' financial responsibility for injuries to their employees." *Hess v. Norfolk S. Ry. Co.*, 106 Ohio St.3d 389, 2005-Ohio-5408, 835 N.E.2d 679, ¶ 18, quoting *Norfolk & W. Ry. Co. v. Liepelt* (1980), 444 U.S. 490, 493, 100 S.Ct. 755, 62 L.Ed.2d 689. "The Supreme Court has long emphasized that uniform application of the FELA is 'essential to effectuate its purposes' and that 'state laws are not controlling in determining what the incidents of this federal right shall be.'" Id., quoting *Dice v. Akron, Canton & Youngstown RR. Co.* (1952), 342 U.S. 359, 361, 72 S.Ct. 312, 96 L.Ed. 398.

{¶ 19} FELA cases may be brought, at plaintiff's option, in federal court or in state court. Section 56, Title 45, U.S.Code. Therefore, "as a general matter, FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal." *Hess*, supra, at ¶ 18, quoting *St. Louis Southwestern Ry. Co. v. Dickerson* (1985), 470 U.S. 409, 411, 105 S.Ct. 1347, 84 L.Ed.2d 303. Therefore, it is clear that the FELA and/or the LBIA preempts any state law that is deemed substantive. However, the Act may be applicable to the federal claims if the Act is procedural in nature. Fortunately, we need not address the issue of whether the overall application of the Act is procedural or substantive because even if we deemed it procedural, which we reserve for discussion at a later date, a substantive right under federal law cannot be lessened or destroyed by a state rule of practice. *Norfolk S. RR. Co. v. Ferebee* (1915), 238 U.S. 269, 35 S.Ct.

781, 59 L.Ed. 1303. The Supreme Court acknowledged that the extent to which the rules of practice and procedure may "dig" into substantive rights is "troublesome." *Brown v. W. Ry. of Alabama* (1949), 338 U.S. 294, 296, 70 S.Ct. 105, 94 L.Ed. 100. The court further noted the impossibility of laying down a precise rule to distinguish "substance" from "procedure." Id. Therefore, we must look at the application of the Act to determine its effect on asbestos claims filed under FELA and/or the LBIA.

{¶ 20} The Act, as codified at R.C. 2307.91 et seq., took effect on September 2, 2004. It reformed asbestos litigation in Ohio by establishing a uniform process for asbestos claimants to use in advancing their claims. The General Assembly, in enacting the Act, stated the following goals:

> (1) give priority to those asbestos claimants who can demonstrate actual physical harm or illness caused by exposure to asbestos; (2) fully preserve the rights of claimants who were exposed to asbestos to pursue compensation should those claimants become impaired in the future as a result of such exposure; (3) enhance the ability of the state's judicial systems and federal judicial systems to supervise and control litigation and asbestos-related bankruptcy proceedings; and (4) conserve the scarce resources of the defendants to allow compensation of cancer victims and others who are physically impaired by exposure to asbestos while securing the right to similar compensation for those who may suffer physical impairment in the future.

Am.Sub.H.B. 292, Section 3(B).

{¶ 21} To maintain a tort action under R.C. 2307.92, a claimant must file, within 30 days of filing

his action, "a written report and supporting test results constituting prima facie evidence of the exposed person's physical impairment that meets the minimum requirements" of the applicable section of R.C. 2307.92. See R.C. 2307.93(A)(1). However, if the claim was pending prior to the effective date of the Act, then the written report is required to be filed within 120 days following the effective date of the Act. R.C. 2307.93(A)(2).

{¶ 22} In the instant case, appellees' claims were pending prior to the effective date of the Act; thus the "post-complaint" report was required to be filed by January 3, 2005. Failure to file the required report results in an administrative dismissal of the claim without prejudice. R.C. 2307.93(C). However, the case may be reinstated once the plaintiff makes a prima facie showing that meets the minimum requirements specified in the applicable section under R.C. 2307.92.

{¶ 23} The applicable section in the instant case is R.C. 2307.92(B), an asbestos claim based on a nonmalignant condition. R.C. 2307.92(B) provides that before a claimant can maintain a tort action under this section, the prima facie showing/report must include "that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is a substantial contributing factor to the medical condition." That prima facie showing shall include all of the following minimum requirements:

> (1) Evidence verifying that a competent medical authority has taken a detailed occupational and exposure history of the exposed person from the exposed person or, if that person is deceased, from the person who is most knowledgeable about the

exposures that form the basis of the asbestos claim for a nonmalignant condition, including all of the following:

(a) All of the exposed person's principal places of employment and exposures to airborne contaminants;

(b) Whether each principal place of employment involved exposures to airborne contaminants, including, but not limited to, asbestos fibers or other disease causing dusts, that can cause pulmonary impairment and, if that type of exposure is involved, the general nature, duration, and general level of the exposure.

(2) Evidence verifying that a competent medical authority has taken a detailed medical and smoking history of the exposed person, including a thorough review of the exposed person's past and present medical problems and the most probable causes of those medical problems;

(3) A diagnosis by a competent medical authority, based on a medical examination and pulmonary function testing of the exposed person, that all of the following apply to the exposed person:

(a) The exposed person has a permanent respiratory impairment rating of at least class 2 as defined by and evaluated pursuant to the AMA guides to the evaluation of permanent impairment.

(b) Either of the following:

(i) The exposed person has asbestosis or diffuse pleural thickening, based at a minimum on radiological or pathological evidence of asbestosis or radiological evidence of diffuse pleural thickening. The asbestosis or diffuse pleural thickening de-

scribed in this division, rather than solely chronic obstructive pulmonary disease, is a substantial contributing factor to the exposed person's physical impairment, based at a minimum on a determination that the exposed person has any of the following:

(I) A forced vital capacity below the predicted lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal;

(II) A total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal;

(III) A chest x-ray showing small, irregular opacities (s,t) graded by a certified B-reader at least 2/1 on the ILO scale.

(ii) If the exposed person has a chest x-ray showing small, irregular opacities (s,t) graded by a certified B-reader as only a 1/0 on the ILO scale, then in order to establish that the exposed person has asbestosis, rather than solely chronic obstructive pulmonary disease, that is a substantial contributing factor to the exposed person's physical impairment the plaintiff must establish that the exposed person has both of the following:

(I) A forced vital capacity below the predicted lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal;

(II) A total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal.

R.C. 2307.92(B).

{¶ 24} Failure to make such a prima facie showing results in an administrative dismissal until such time that the plaintiff can make such showing. Consequently, a claimant asserting a cause of action under the FELA and/or LBIA in an Ohio state court would be precluded from proceeding on his cause of action until he files this mandated postcomplaint report making the requisite prima facie showing. No other state, except Georgia, has such a requirement.[2]

{¶ 25} It has clearly been decided that a federal right cannot be defeated by the forms of local practice. *Brown*, 338 U.S. at 297, 70 S.Ct. 105, 94 L.Ed. 100. This rule has been held to apply to FELA cases. Id., citing *Reynolds v. Atlantic Coast Line RR. Co.* (1949), 336 U.S. 207, 69 S.Ct. 507, 93 L.Ed. 618. Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws. Id. "'Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.'" *Brown*, 338 U.S. at 298-299, 70 S.Ct. 105, 94 L.Ed. 100, quoting *Davis v. Wechsler* (1923), 263 U.S. 22, 24, 44 S.Ct. 13, 68 L.Ed. 143. "Should this Court fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved."

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[2] In 2005, Georgia passed legislation requiring asbestos claimants to file a similar report before proceeding on the merits of their claims. No appellate decisions have been rendered interpreting those statutes. Georgia's statutes contain language similar to the Ohio Act.

Brown, 338 U.S. at 299, 70 S.Ct. 105, 94 L.Ed. 100, citing *Brady v. S. Ry. Co.* (1943), 320 U.S. 476, 479, 64 S.Ct. 232, 88 L.Ed. 239. "Peculiarities of local law may not gnaw at rights rooted in federal legislation." *S. Buffalo R. Co. v. Ahern* (1953), 344 U.S. 367, 73 S.Ct. 340, 97 L.Ed. 395, citing *Am. Ry. Express Co. v. Levee* (1923), 263 U.S. 19, 21, 44 S.Ct. 11, 68 L.Ed. 140.

{¶ 26} In the instant case, the Act requires that claimants seeking to bring a claim for injury allegedly from asbestos exposure submit a report after their initial claim is filed. The new Ohio requirement precludes the FELA/LBIA claimants from proceeding on their claims until filing the report satisfying the requirements of R.C. 2307.92 et seq. We hold that this requirement would "gnaw" at the FELA/LBIA claimants' substantive rights to assert a cause of action under federal law in a state court. FELA claimants would essentially be indefinitely precluded from asserting their federal rights until they complied with these requirements. This would not further Congress's intent of creating "uniformity throughout the Union with respect to railroads' financial responsibility for injuries to their employees." *Liepelt*, 444 U.S. at 493, 100 S.Ct. 755, 62 L.Ed.2d 689.

{¶ 27} Norfolk argues that federal courts employ a procedure similar to the Act to prioritize and administratively dismiss FELA asbestos claims. Therefore, Norfolk claims that if the FELA actions at issue had been filed in federal court, appellees would have been subject to similar procedural requirements. Norfolk points to the Administrative Order No. 8 of the United States District Court Judge Charles R. Weiner, filed January 16, 2002, which implemented a

prioritization and administrative dismissal process for FELA cases. A cursory reading reveals that the order provides that a doctor-patient medical report setting forth an asbestos-related disease is required. However, we have no evidence before us demonstrating or identifying what requirements the report must include. The order provides:

> 1. [a]ll non-malignant, asbestos related, personal-injury cases assigned to MDL 875 which were initiated through a mass-screening shall be subject to administrative dismissal without prejudice and with the tolling of all applicable statute of limitations.
>
> * * *
>
> 3. Any party may request reinstatement to active status of a case by filing with the Court a request for reinstatement together with an affidavit setting forth the facts that qualify the case for active processing. * * * The burden at any hearing to reinstate shall be upon the plaintiff to show some evidence of asbestos exposure and evidence of an asbestos-related disease. Exposure to specific products shall not be a requirement for reinstatement.

{¶ 28} Clearly, the mandates that this administrative order imposes on a FELA plaintiff are not as detailed and stringent as those required under R.C. 2307.92(B). Therefore, contrary to Norfolk's assertion, appellees would not have been subject to the same administrative dismissal and reinstatement process had they filed their claims in federal court. Accordingly, we conclude that the Act, as applied to FELA/LBIA claimants, is not merely procedural, as it might preclude claimants from vindicating a

substantive right to bring a claim under FELA/LBIA. Moreover, federal law preempts the entire field of locomotive safety, including asbestos-related injury claims.

{¶ 29} Norfolk makes a policy argument as its final assignment of error. Norfolk argues that if we exclude FELA actions from the application of the Act, certain fundamental rights of the FELA defendants will be infringed upon, including the rights of contribution and indemnification. We hold that this argument is not ripe for our review because the FELA defendants have not suffered any infringement of their rights concerning indemnification or contribution. Although we understand the proactive argument raised by Norfolk, we hold that such policy arguments are better suited for the General Assembly. Nevertheless, in *Hess*, the Ohio Supreme Court held that the proper measure of damages under the FELA is governed by federal law rather than state law. Therefore, any indemnification or contribution sought by Norfolk should be pursued under the jurisdiction of federal law. The Act would seemingly have no application or effect.

{¶ 30} Therefore, we hold that the application of H.B. 292 to asbestos claims arising under the FELA and/or the LBIA infringes on the Supremacy Clause of the United States Constitution and thus is preempted by federal law. Accordingly, Norfolk's assignments of error are overruled.

Judgment affirmed.

KILBANE and TIMOTHY E. McMONAGLE, JJ., concur.

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Civil Action – Asbestos

Case No. CV-04-542998

NORFOLK SOUTHERN RAILWAY COMPANY,
Plaintiff,

v.

HOMER R. BOGLE, ET AL.,
Defendants.

[Filed April 15, 2005]

JUDGMENT ENTRY

The Court wishes to clarify its February 24, 2005 Entry and Opinion. Defendant's Motion to Dismiss Norfolk Southern Railway Company's Complaint for Declaratory Judgment is denied. Plaintiff's Motion for Summary Judgment is denied. The February 24, 2005 Entry and Opinion represents the declaration of the rights and obligations of the respective parties. As explained therein, Plaintiff's Complaint for Declaratory Judgment while procedurally correct is substantively erroneous. Plaintiff's request for declaratory relief as set forth in its Complaint is denied. The Court declares that the application of H.B. 292 to the instant cases is preempted by the FELA and LBIA.

IT IS SO ORDERED.

/s/ HARRY A. HANNA
JUDGE HARRY A. HANNA

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Civil Action – Asbestos

Case No. CV-04-542998

NORFOLK SOUTHERN RAILWAY COMPANY,
Plaintiff,

v.

HOMER R. BOGLE, ET AL.,
Defendants.

[Filed April 15, 2005]

NUNC PRO TUNC ORDER

The Court wishes to clarify its February 24, 2005 Entry and Opinion (File & Serve I.D. #5210253). Defendant's Motion to Dismiss Norfolk Southern Railway Company's Complaint for Declaratory Judgment (File & Serve I.D. #4572906) is denied.

This entry is ordered Nunc Pro Tunc to correct the typographical error in this Court's unjournalized entry dated March 4, 2005.

IT IS SO ORDERED.

/s/ HARRY A. HANNA
JUDGE HARRY A. HANNA

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Case No. 542998

NORFOLK SOUTHERN RAILWAY COMPANY,
Plaintiff,

v.

HOMER R. BOGLE, ET AL.,
Defendants.

[Filed April 15, 2005]

ENTRY AND OPINION

I. INTRODUCTION

Plaintiff Norfolk Southern Railway Company ("Norfolk Southern") filed a Complaint for Declaratory Judgment[1] in four FELA/LBIA[2] cases: (1) Homer R. Bogle ("Bogle"), Case No. 518146; (2) William H. Monroe, Jr. ("Monroe"), Administrator of the Estate of Worth Oliver Bryant, Case No. 497980; (3) Charles Odell Weldon ("Weldon"), Case No. 391852; and (4) Eric C. Wiles ("Wiles"), Individually and in his capacity as Executor of the Estate of Larry Arnold Wiles, Case No. 391853. Norfolk Southern requests a Declaratory Judgment finding that: (1) Am. Sub. H.B. 292 applies to the four above-cited FELA/LBIA cases; (2) Am. Sub. H.B. 292 does not infringe upon

[1] File & Serve I.D. #4196730

[2] Federal Employers Liability Act, 45 U.S.C. § 51, et. seq., (FELA); Locomotive Boiler Inspection Act, 49 U.S.C. § 20701.

the Supremacy Clause of the Constitution of the United States.

In response, Defendants Bogle, Monroe, Weldon, and Wiles filed a Motion to Dismiss[3] Norfolk Southern's Complaint for Declaratory Judgment, asserting, inter alia, that the Complaint fails to raise a justiciable controversy because this Court has previously ordered that H.B. 292 does not apply to claims arising under the FELA and the LBIA.

Norfolk Southern then filed a Brief in Opposition[4] to Defendants' Motion to Dismiss, asserting a justiciable controversy exists as of January 3, 2005,[5] which marks the one hundred and twenty day (120) deadline in which to file a written report and supporting test results pursuant to R.C. § 2307.93. Additionally, Norfolk Southern contends that the Court's August 23, 2004 Order[6] is not binding on Bogle, Monroe, Weldon, and Wiles because that Order applied only to Special Docket 073958 cases and not to the instant actions.

II. LAW AND ARGUMENT

R.C. § 2721.03, the declaratory judgment statute, provides in part, "* * * any person whose rights, status, or other legal relations are affected by a * * * statute * * * may have determined any question of construction or validity arising under the * * *

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[3] File & Serve I.D. #4572906

[4] File & Serve I.D. #4694782

[5] In their brief, Plaintiff's assert the 120-day deadline expired on January 3, 2004; however, this is clearly a clerical error since Am. Sub. H.B. 292 took effect on September 2, 2004.

[6] File & Serve I.D. #4089851

statute and * * * obtain a declaration of rights, status, or other legal relations under it."

"In order to obtain declaratory relief, [a] plaintiff must establish (1) that a real controversy exists between the parties, (2) that the controversy is justiciable, and (3) that speedy relief is necessary to preserve the rights of the parties. * * * Inherent in these requirements is the principle that Ohio courts do not render advisory opinions." *R.A.S. Entertainment, Inc. v. Cleveland* (1998), 130 Ohio App.3d 125, citing *Burger Brewing Co. v. Ohio Liquor Control Co.nm.* (1973), 34 Ohio St.2d 93; *Haig v. Ohio State Bd. of Edn.* (1992), 62 Ohio St.3d 507; *Egan v. Natl. Distillers & Chem. Corp.* (1986), 25 Ohio St.3d 176.

It has been repeatedly held in Ohio that "There are only two reasons for dismissing a complaint for declaratory judgment before the court addresses the merits of the case: (1) there is neither a justiciable issue nor an actual controversy between the parties requiring speedy relief to preserve rights which may otherwise be lost or impaired; or (2) in accordance with R.C. 2721.07, the declaratory judgment will not terminate the uncertainty or controversy." *Halley v. Ohio Co.* (1995), 107 Ohio App.3d 518, citing *Wagner v. Cleveland* (1988), 62 Ohio App.3d 8; *Burger Brewing Co.* supra. A controversy exists when there is a genuine dispute between parties with opposing legal interests and that dispute is of sufficient immediacy that declaratory judgment is necessary. *Wagner*, 62 Ohio App.3d 8.

There is no doubt that an actual dispute exists between the parties herein. On January 3, 2005, the one hundred and twenty day (120) deadline in which to file a written report and supporting tests results pursuant to R.C. § 2307.93 expired. To date,

Defendants Bogle, Monroe, Weldon, and Wiles have not produced the required documentation. Therefore, Defendants are in violation of R.C. § 2307.93 *if* H.B. 292 applies to their FELA and LBIA claims.

We agree with Norfolk Southern that this Court's August 23, 2004 Order is not binding on Defendants' cases. In our Order we concluded: "The application of the Ohio statute *to the instant cases* is preempted by that extensive body of federal law" (emphasis added). The four cases now before the Court were not included in that Order, and are thus not binding on Defendants. However, we disagree with Norfolk Southern's assertion that H.B. 292 encompasses Defendants' civil actions in the Cuyahoga County Court of Common Pleas alleging asbestos claims under the FELA and/or the LBIA.

The general congressional intent to promote liberal recovery for injured railroad workers is well established. *See Ayers*, 538 U.S. 135, 123 S. Ct. 1210, 155 L. Ed. 2d 261; *Urie*, 337 U.S. at 163, 69 S. Ct. at 1018, 93 L. Ed. at 1282. There can be no dispute that the FELA was designed to regulate the entire field of railroad injuries and supersede and replace state regulation of those injuries. The FELA was **"undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce, and that it is paramount and exclusive."** *New York Central Railroad Company v. Winfield*, 244 U.S. 147, 152, 37 S. Ct. 546, 61 L. Ed. 1045 (1917) (emphasis added).

The congressional purpose of the Act was to provide a national law of uniform operation throughout the states and to **"withdraw all injuries to rail-**

road employees in interstate commerce from the operation of varying state laws." *Id.* at 150.

This purpose is exemplified in the legislative history of the statute:

> [The FELA] is intended in its scope to cover all commerce to which regulative power of Congress extends . . . by this bill it is hoped to fix a uniform rule of liability throughout the Union with reference to the liability of common carriers to their employees . . . **A Federal statute of this character will supplant the numerous state statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union and the legal status of such employer's liability for personal injuries, instead of being subject to numerous rules, will be fixed by one rule in all states.**

Id. at 150 (citations omitted) (emphasis added).

Accordingly, it has been an overriding principle of FELA jurisprudence, established by Congress, emphasized repeatedly by the Supreme Court of the United States and well-recognized here in Ohio, that a **"substantive right or defense arising under the act cannot be lessened or destroyed by a local rule . . ."** *Norfolk Southern Railroad v. Ferebee*, 238 U.S. 269, 35 S. Ct. 781, 59 L. Ed. 1303 (1915) (emphasis added); *see also South Buffalo Rail Company v. Ahern*, 344 U.S. 367, 73 S. Ct. 340, 97 L. Ed. 395 (1952) **("Peculiarities of local law may not gnaw at rights rooted in federal legislation.")** (emphasis added). *See* August 23, 2004 Order at p. 4-5.

III. CONCLUSION

Norfolk Southern's Complaint for Declaratory Judgment, while procedurally correct, is substantively erroneous. The application of H.B. 292 to the instant cases is preempted by the FELA and LBIA. Furthermore, all pending and future FELA/LBIA cases filed by plaintiffs pursuant to R.C. § 2307.93, et seq., are preempted by that extensive body of federal jurisprudence.

IT IS SO ORDERED.

Judge Leo M. Spellacy
Judge Harry A. Hanna
Justice Francis E. Sweeney

February 24, 2005

/s/ HARRY A. HANNA
JUDGE HARRY A. HANNA

SUPREME COURT OF OHIO

No. 2006-1025

NORFOLK SOUTHERN RAILWAY COMPANY,
Appellant,

v.

HOMER R. BOGLE, ET AL.,
Appellees.

[December 12, 2007]

RECONSIDERATION ENTRY

It is ordered by the Court that the motion for reconsideration in this case is denied.

(Cuyahoga County Court of Appeals; No. 86339)

/s/ THOMAS J. MOYER
THOMAS J. MOYER
Chief Justice

STATUTORY PROVISIONS INVOLVED

45 U.S.C. § 51 provides:

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

45 U.S.C. § 56 provides:

§ 56. Actions; limitation; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

49 U.S.C. § 20701 provides:

§ 20701. Requirements for use

A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances –

(1) are in proper condition and safe to operate without unnecessary danger of personal injury;

(2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and

(3) can withstand every test prescribed by the Secretary under this chapter.

Ohio Rev. Code Ann. §§ 2307.91-2307.96 provide:

§ 2307.91 Definitions

As used in sections 2307.91 to 2307.96 of the Revised Code:

(A) "AMA guides to the evaluation of permanent impairment" means the American medical association's guides to the evaluation of permanent impairment (fifth edition 2000) as may be modified by the American medical association.

(B) "Asbestos" means chrysotile, amosite, crocidolite, tremolite asbestos, anthophyllite asbestos, actinolite asbestos, and any of these minerals that have been chemically treated or altered.

(C) "Asbestos claim" means any claim for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to asbestos. "Asbestos claim" includes a claim made by or on behalf of any person who has been exposed to asbestos, or any representative, spouse, parent, child, or other relative of that person, for injury, including mental or emotional injury, death, or loss to person, risk of disease or other injury, costs of medical monitoring or surveillance, or any other effects on the person's health that are caused by the person's exposure to asbestos.

(D) "Asbestosis" means bilateral diffuse interstitial fibrosis of the lungs caused by inhalation of asbestos fibers.

(E) "Board-certified internist" means a medical doctor who is currently certified by the American board of internal medicine.

(F) "Board-certified occupational medicine specialist" means a medical doctor who is currently certified by the American board of preventive medicine in the specialty of occupational medicine.

(G) "Board-certified oncologist" means a medical doctor who is currently certified by the American board of internal medicine in the subspecialty of medical oncology.

(H) "Board-certified pathologist" means a medical doctor who is currently certified by the American board of pathology.

(I) "Board-certified pulmonary specialist" means a medical doctor who is currently certified by the American board of internal medicine in the subspecialty of pulmonary medicine.

(J) "Certified B-reader" means an individual qualified as a "final" or "B-reader" as defined in 42 C.F.R. section 37.51(b), as amended.

(K) "Certified industrial hygienist" means an industrial hygienist who has attained the status of diplomate of the American academy of industrial hygiene subject to compliance with requirements established by the American board of industrial hygiene.

(L) "Certified safety professional" means a safety professional who has met and continues to meet all requirements established by the board of certified safety professionals and is authorized by that board to use the certified safety professional title or the CSP designation.

(M) "Civil action" means all suits or claims of a civil nature in a state or federal court, whether cognizable

as cases at law or in equity or admiralty. "Civil action" does not include any of the following:

(1) A civil action relating to any workers' compensation law;

(2) A civil action alleging any claim or demand made against a trust established pursuant to 11 U.S.C. section 524(g);

(3) A civil action alleging any claim or demand made against a trust established pursuant to a plan of reorganization confirmed under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. Chapter 11.

(N) "Exposed person" means any person whose exposure to asbestos or to asbestos-containing products is the basis for an asbestos claim under section 2307.92 of the Revised Code.

(O) "FEV1" means forced expiratory volume in the first second, which is the maximal volume of air expelled in one second during performance of simple spirometric tests.

(P) "FVC" means forced vital capacity that is maximal volume of air expired with maximum effort from a position of full inspiration.

(Q) "ILO scale" means the system for the classification of chest x-rays set forth in the international labour office's guidelines for the use of ILO international classification of radiographs of pneumoconioses (2000), as amended.

(R) "Lung cancer" means a malignant tumor in which the primary site of origin of the cancer is inside the lungs, but that term does not include mesothelioma.

(S) "Mesothelioma" means a malignant tumor with a primary site of origin in the pleura or the peritoneum, which has been diagnosed by a board-certified pathologist, using standardized and accepted criteria of microscopic morphology and appropriate staining techniques.

(T) "Nonmalignant condition" means a condition that is caused or may be caused by asbestos other than a diagnosed cancer.

(U) "Pathological evidence of asbestosis" means a statement by a board-certified pathologist that more than one representative section of lung tissue uninvolved with any other disease process demonstrates a pattern of peribronchiolar or parenchymal scarring in the presence of characteristic asbestos bodies and that there is no other more likely explanation for the presence of the fibrosis.

(V) "Physical impairment" means a nonmalignant condition that meets the minimum requirements specified in division (B) of section 2307.92 of the Revised Code, lung cancer of an exposed person who is a smoker that meets the minimum requirements specified in division (C) of section 2307.92 of the Revised Code, or a condition of a deceased exposed person that meets the minimum requirements specified in division (D) of section 2307.92 of the Revised Code.

(W) "Plethysmography" means a test for determining lung volume, also known as "body plethysmography," in which the subject of the test is enclosed in a chamber that is equipped to measure pressure, flow, or volume changes.

(X) "Predicted lower limit of normal" means the fifth percentile of healthy populations based on age, height, and gender, as referenced in the AMA guides to the evaluation of permanent impairment.

(Y) "Premises owner" means a person who owns, in whole or in part, leases, rents, maintains, or controls privately owned lands, ways, or waters, or any buildings and structures on those lands, ways, or waters, and all privately owned and state-owned lands, ways, or waters leased to a private person, firm, or organization, including any buildings and structures on those lands, ways, or waters.

(Z) "Competent medical authority" means a medical doctor who is providing a diagnosis for purposes of constituting prima-facie evidence of an exposed person's physical impairment that meets the requirements specified in section 2307.92 of the Revised Code and who meets the following requirements:

(1) The medical doctor is a board-certified internist, pulmonary specialist, oncologist, pathologist, or occupational medicine specialist.

(2) The medical doctor is actually treating or has treated the exposed person and has or had a doctor-patient relationship with the person.

(3) As the basis for the diagnosis, the medical doctor has not relied, in whole or in part, on any of the following:

(a) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition in violation of any law, regulation, licensing requirement, or medical code of

practice of the state in which that examination, test, or screening was conducted;

(b) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition that was conducted without clearly establishing a doctor-patient relationship with the claimant or medical personnel involved in the examination, test, or screening process;

(c) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition that required the claimant to agree to retain the legal services of the law firm sponsoring the examination, test, or screening.

(4) The medical doctor spends not more than twenty-five per cent of the medical doctor's professional practice time in providing consulting or expert services in connection with actual or potential tort actions, and the medical doctor's medical group, professional corporation, clinic, or other affiliated group earns not more than twenty per cent of its revenues from providing those services.

(AA) "Radiological evidence of asbestosis" means a chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader as at least 1/1 on the ILO scale.

(BB) "Radiological evidence of diffuse pleural thickening" means a chest x-ray showing bilateral pleural thickening graded by a certified B-reader as at least B2 on the ILO scale and blunting of at least one costophrenic angle.

(CC) "Regular basis" means on a frequent or recurring basis.

(DD) "Smoker" means a person who has smoked the equivalent of one-pack year, as specified in the written report of a competent medical authority pursuant to sections 2307.92 and 2307.93 of the Revised Code, during the last fifteen years.

(EE) "Spirometry" means the measurement of volume of air inhaled or exhaled by the lung.

(FF) "Substantial contributing factor" means both of the following:

(1) Exposure to asbestos is the predominate cause of the physical impairment alleged in the asbestos claim.

(2) A competent medical authority has determined with a reasonable degree of medical certainty that without the asbestos exposures the physical impairment of the exposed person would not have occurred.

(GG) "Substantial occupational exposure to asbestos" means employment for a cumulative period of at least five years in an industry and an occupation in which, for a substantial portion of a normal work year for that occupation, the exposed person did any of the following:

(1) Handled raw asbestos fibers;

(2) Fabricated asbestos-containing products so that the person was exposed to raw asbestos fibers in the fabrication process;

(3) Altered, repaired, or otherwise worked with an asbestos-containing product in a manner that

exposed the person on a regular basis to asbestos fibers;

(4) Worked in close proximity to other workers engaged in any of the activities described in division (GG)(1), (2), or (3) of this section in a manner that exposed the person on a regular basis to asbestos fibers.

(HH) "Timed gas dilution" means a method for measuring total lung capacity in which the subject breathes into a spirometer containing a known concentration of an inert and insoluble gas for a specific time, and the concentration of the inert and insoluble gas in the lung is then compared to the concentration of that type of gas in the spirometer.

(II) "Tort action" means a civil action for damages for injury, death, or loss to person. "Tort action" includes a product liability claim that is subject to sections 2307.71 to 2307.80 of the Revised Code. "Tort action" does not include a civil action for damages for a breach of contract or another agreement between persons.

(JJ) "Total lung capacity" means the volume of air contained in the lungs at the end of a maximal inspiration.

(KK) "Veterans' benefit program" means any program for benefits in connection with military service administered by the veterans' administration under title 38 of the United States Code.

(LL) "Workers' compensation law" means Chapters 4121., 4123., 4127., and 4131. of the Revised Code.

§ 2307.92 Requirements for prima-facie showing of physical impairment for certain tort actions involving asbestos exposure

(A) For purposes of section 2305.10 and sections 2307.92 to 2307.95 of the Revised Code, "bodily injury caused by exposure to asbestos" means physical impairment of the exposed person, to which the person's exposure to asbestos is a substantial contributing factor.

(B) No person shall bring or maintain a tort action alleging an asbestos claim based on a nonmalignant condition in the absence of a prima-facie showing, in the manner described in division (A) of section 2307.93 of the Revised Code, that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

(1) Evidence verifying that a competent medical authority has taken a detailed occupational and exposure history of the exposed person from the exposed person or, if that person is deceased, from the person who is most knowledgeable about the exposures that form the basis of the asbestos claim for a nonmalignant condition, including all of the following:

(a) All of the exposed person's principal places of employment and exposures to airborne contaminants;

(b) Whether each principal place of employment involved exposures to airborne contaminants, including, but not limited to, asbestos fibers or other disease causing dusts, that can cause pulmonary impairment and, if that type of exposure is involved, the general nature, duration, and general level of the exposure.

(2) Evidence verifying that a competent medical authority has taken a detailed medical and smoking history of the exposed person, including a thorough review of the exposed person's past and present medical problems and the most probable causes of those medical problems;

(3) A diagnosis by a competent medical authority, based on a medical examination and pulmonary function testing of the exposed person, that all of the following apply to the exposed person:

(a) The exposed person has a permanent respiratory impairment rating of at least class 2 as defined by and evaluated pursuant to the AMA guides to the evaluation of permanent impairment.

(b) Either of the following:

(i) The exposed person has asbestosis or diffuse pleural thickening, based at a minimum on radiological or pathological evidence of asbestosis or radiological evidence of diffuse pleural thickening. The asbestosis or diffuse pleural thickening described in this division, rather than solely chronic obstructive pulmonary disease, is a substantial contributing factor to the exposed person's physical impairment, based

at a minimum on a determination that the exposed person has any of the following:

(I) A forced vital capacity below the predicted lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal;

(II) A total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal;

(III) A chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader at least 2/1 on the ILO scale.

(ii) If the exposed person has a chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader as only a 1/0 on the ILO scale, then in order to establish that the exposed person has asbestosis, rather than solely chronic obstructive pulmonary disease, that is a substantial contributing factor to the exposed person's physical impairment the plaintiff must establish that the exposed person has both of the following:

(I) A forced vital capacity below the predicted lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal;

(II) A total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal.

(C)(1) No person shall bring or maintain a tort action alleging an asbestos claim based upon lung cancer of an exposed person who is a smoker, in the absence of a prima-facie showing, in the manner

described in division (A) of section 2307.93 of the Revised Code, that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

(a) A diagnosis by a competent medical authority that the exposed person has primary lung cancer and that exposure to asbestos is a substantial contributing factor to that cancer;

(b) Evidence that is sufficient to demonstrate that at least ten years have elapsed from the date of the exposed person's first exposure to asbestos until the date of diagnosis of the exposed person's primary lung cancer. The ten-year latency period described in this division is a rebuttable presumption, and the plaintiff has the burden of proof to rebut the presumption.

(c) Either of the following:

(i) Evidence of the exposed person's substantial occupational exposure to asbestos;

(ii) Evidence of the exposed person's exposure to asbestos at least equal to 25 fiber per cc years as determined to a reasonable degree of scientific probability by a scientifically valid retrospective exposure reconstruction conducted by a certified industrial hygienist or certified safety professional based upon all reasonably available quantitative air monitoring data and all other reasonably available information about the exposed

person's occupational history and history of exposure to asbestos.

(2) If a plaintiff files a tort action that alleges an asbestos claim based upon lung cancer of an exposed person who is a smoker, alleges that the plaintiff's exposure to asbestos was the result of living with another person who, if the tort action had been filed by the other person, would have met the requirements specified in division (C)(1)(c) of this section, and alleges that the plaintiff lived with the other person for the period of time specified in division (GG) of section 2307.91 of the Revised Code, the plaintiff is considered as having satisfied the requirements specified in division (C)(1)(c) of this section.

(D)(1) No person shall bring or maintain a tort action alleging an asbestos claim that is based upon a wrongful death, as described in section 2125.01 of the Revised Code of an exposed person in the absence of a prima-facie showing, in the manner described in division (A) of section 2307.93 of the Revised Code, that the death of the exposed person was the result of a physical impairment, that the death and physical impairment were a result of a medical condition, and that the deceased person's exposure to asbestos was a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

(a) A diagnosis by a competent medical authority that exposure to asbestos was a substantial contributing factor to the death of the exposed person;

(b) Evidence that is sufficient to demonstrate that at least ten years have elapsed from the date of the deceased exposed person's first exposure to

asbestos until the date of diagnosis or death of the deceased exposed person. The ten-year latency period described in this division is a rebuttable presumption, and the plaintiff has the burden of proof to rebut the presumption.

(c) Either of the following:

(i) Evidence of the deceased exposed person's substantial occupational exposure to asbestos;

(ii) Evidence of the deceased exposed person's exposure to asbestos at least equal to 25 fiber per cc years as determined to a reasonable degree of scientific probability by a scientifically valid retrospective exposure reconstruction conducted by a certified industrial hygienist or certified safety professional based upon all reasonably available quantitative air monitoring data and all other reasonably available information about the deceased exposed person's occupational history and history of exposure to asbestos.

(2) If a person files a tort action that alleges an asbestos claim based on a wrongful death, as described in section 2125.01 of the Revised Code, of an exposed person, alleges that the death of the exposed person was the result of living with another person who, if the tort action had been filed by the other person, would have met the requirements specified in division (D)(1)(c) of this section, and alleges that the exposed person lived with the other person for the period of time specified in division (GG) of section 2307.91 of the Revised Code in order to qualify as a substantial occupational exposure to asbestos, the exposed person is considered as having satisfied the requirements specified in division (D)(1)(c) of this section.

(3) No court shall require or permit the exhumation of a decedent for the purpose of obtaining evidence to make, or to oppose, a prima-facie showing required under division (D)(1) or (2) of this section regarding a tort action of the type described in that division.

(E) No prima-facie showing is required in a tort action alleging an asbestos claim based upon mesothelioma.

(F) Evidence relating to physical impairment under this section, including pulmonary function testing and diffusing studies, shall comply with the technical recommendations for examinations, testing procedures, quality assurance, quality control, and equipment incorporated in the AMA guides to the evaluation of permanent impairment and reported as set forth in 20 C.F.R. Pt. 404, Subpt. P, App. 1, Part A, Sec. 3.00 E. and F., and the interpretive standards set forth in the official statement of the American thoracic society entitled "lung function testing: selection of reference values and interpretive strategies" as published in American review of respiratory disease, 1991:144:1202-1218.

(G) All of the following apply to the court's decision on the prima-facie showing that meets the requirements of division (B), (C), or (D) of this section:

(1) The court's decision does not result in any presumption at trial that the exposed person has a physical impairment that is caused by an asbestos-related condition.

(2) The court's decision is not conclusive as to the liability of any defendant in the case.

(3) The court's findings and decisions are not admissible at trial.

(4) If the trier of fact is a jury, the court shall not instruct the jury with respect to the court's decision on the prima-facie showing, and neither counsel for any party nor a witness shall inform the jury or potential jurors of that showing.

2307.93 Filing of report and test results supporting physical impairment claim; defendant's challenge of evidence; dismissal

(A)(1) The plaintiff in any tort action who alleges an asbestos claim shall file, within thirty days after filing the complaint or other initial pleading, a written report and supporting test results constituting prima-facie evidence of the exposed person's physical impairment that meets the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code, whichever is applicable. The defendant in the case shall be afforded a reasonable opportunity, upon the defendant's motion, to challenge the adequacy of the proffered prima-facie evidence of the physical impairment for failure to comply with the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code. The defendant has one hundred twenty days from the date the specified type of prima-facie evidence is proffered to challenge the adequacy of that prima-facie evidence. If the defendant makes that challenge and uses a physician to do so, the physician must meet the requirements

specified in divisions (Z)(1), (3), and (4) of section 2307.91 of the Revised Code.

(2) With respect to any asbestos claim that is pending on the effective date of this section, the plaintiff shall file the written report and supporting test results described in division (A)(1) of this section within one hundred twenty days following the effective date of this section. Upon motion and for good cause shown, the court may extend the one hundred twenty-day period described in this division.

(3)(a) For any cause of action that arises before the effective date of this section, the provisions set forth in divisions (B), (C), and (D) of section 2307.92 of the Revised Code are to be applied unless the court that has jurisdiction over the case finds both of the following:

(i) A substantive right of a party to the case has been impaired.

(ii) That impairment is otherwise in violation of Section 28 of Article II, Ohio Constitution.

(b) If a finding under division (A)(3)(a) of this section is made by the court that has jurisdiction over the case, then the court shall determine whether the plaintiff has failed to provide sufficient evidence to support the plaintiff's cause of action or the right to relief under the law that is in effect prior to the effective date of this section.

(c) If the court that has jurisdiction of the case finds that the plaintiff has failed to provide sufficient evidence to support the plaintiff's cause of action or right to relief under division (A)(3)(b) of this section, the court shall administratively dismiss the plaintiff's claim without prejudice. The court shall main-

tain its jurisdiction over any case that is administratively dismissed under this division. Any plaintiff whose case has been administratively dismissed under this division may move to reinstate the plaintiff's case if the plaintiff provides sufficient evidence to support the plaintiff's cause of action or the right to relief under the law that was in effect when the plaintiff's cause of action arose.

(B) If the defendant in an action challenges the adequacy of the prima-facie evidence of the exposed person's physical impairment as provided in division (A)(1) of this section, the court shall determine from all of the evidence submitted whether the proffered prima-facie evidence meets the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code. The court shall resolve the issue of whether the plaintiff has made the prima-facie showing required by division (B), (C), or (D) of section 2307.92 of the Revised Code by applying the standard for resolving a motion for summary judgment.

(C) The court shall administratively dismiss the plaintiff's claim without prejudice upon a finding of failure to make the prima-facie showing required by division (B), (C), or (D) of section 2307.92 of the Revised Code. The court shall maintain its jurisdiction over any case that is administratively dismissed under this division. Any plaintiff whose case has been administratively dismissed under this division may move to reinstate the plaintiff's case if the plaintiff makes a prima-facie showing that meets the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code.

2307.94 Statute of limitations for asbestos claim arising out of nonmalignant condition as distinct cause of action; damages; settlement; release

(A) Notwithstanding any other provision of the Revised Code, with respect to any asbestos claim based upon a nonmalignant condition that is not barred as of the effective date of this section, the period of limitations shall not begin to run until the exposed person has a cause of action for bodily injury pursuant to section 2305.10 of the Revised Code. An asbestos claim based upon a nonmalignant condition that is filed before the cause of action for bodily injury pursuant to that section arises is preserved for purposes of the period of limitations.

(B) An asbestos claim that arises out of a nonmalignant condition shall be a distinct cause of action from an asbestos claim relating to the same exposed person that arises out of asbestos-related cancer. No damages shall be awarded for fear or risk of cancer in any tort action asserting only an asbestos claim for a nonmalignant condition.

(C) No settlement of an asbestos claim for a nonmalignant condition that is concluded after the effective date of this section shall require, as a condition of settlement, the release of any future claim for asbestos-related cancer.

2307.941 Premises liability

(A) The following apply to all tort actions for asbestos claims brought against a premises owner to recover damages or other relief for exposure to asbestos on the premises owner's property:

(1) A premises owner is not liable for any injury to any individual resulting from asbestos exposure unless that individual's alleged exposure occurred while the individual was at the premises owner's property.

(2) If exposure to asbestos is alleged to have occurred before January 1, 1972, it is presumed that a premises owner knew that this state had adopted safe levels of exposure for asbestos and that products containing asbestos were used on its property only at levels below those safe levels of exposure. To rebut this presumption, the plaintiff must prove by a preponderance of the evidence that the premises owner knew or should have known that the levels of asbestos in the immediate breathing zone of the plaintiff regularly exceeded the threshold limit values adopted by this state and that the premises owner allowed that condition to persist.

(3)(a) A premises owner is presumed to be not liable for any injury to any invitee who was engaged to work with, install, or remove asbestos products on the premises owner's property if the invitee's employer held itself out as qualified to perform the work. To rebut this presumption, the plaintiff must prove by a preponderance of the evidence that at the time of the exposure to asbestos that is alleged the premises owner had actual knowledge of the potential dangers of the asbestos

products at the time of the alleged exposure that was superior to the knowledge of both the invitee and the invitee's employer.

(b) A premises owner that hired a contractor before January 1, 1972, to perform the type of work at the premises owner's property that the contractor was qualified to perform cannot be liable for any injury to any individual resulting from asbestos exposure caused by any of the contractor's employees or agents on the premises owner's property unless the premises owner directed the activity that resulted in the injury or gave or denied permission for the critical acts that led to the individual's injury.

(c) If exposure to asbestos is alleged to have occurred on or after January 1, 1972, a premises owner is not liable for any injury to any individual resulting from that exposure caused by a contractor's employee or agent on the premises owner's property unless the plaintiff establishes the premises owner's intentional violation of an established safety standard that was in effect at the time of the exposure and that the alleged violation was in the plaintiff's breathing zone and was the proximate cause of the plaintiff's medical condition.

(B) As used in this section:

(1) "Threshold limit values" means that, for the years 1946 through 1971, the concentration of asbestos in a worker's breathing zone did not exceed the following maximum allowable exposure limits for the eight-hour time-weighted average airborne concentration:

(a) Asbestos: five million particles per cubic foot;

(b) Cadmium: 0.10 milligrams per cubic meter;

(c) Chromic acid and chromates (calculated as chromic oxide): 0.10 milligrams per cubic meter;

(d) Lead: 0.15 milligrams per cubic meter;

(e) Manganese: 6.0 milligrams per cubic meter;

(f) Mercury: 0.10 milligrams per cubic meter;

(g) Zinc oxide: 15.0 milligrams per cubic meter;

(h) Chlorinated diphenyls: 1.0 milligram per cubic meter;

(i) Chlorinated naphthalenes (trichlornaphthalene): 5.0 milligrams per cubic meter;

(j) Chlorinated naphthalenes (pentachlornaphthalene): 0.50 milligrams per cubic meter.

(2) "Established safety standard" means that, for the years after 1971, the concentration of asbestos in the breathing zone of a worker does not exceed the maximum allowable exposure limits for the eight-hour time-weighted average airborne concentration as promulgated by the occupational safety and health administration (OSHA) in effect at the time of the alleged exposure.

(3) "Employee" means an individual who performs labor or provides construction services pursuant to a construction contract as defined in section 4123.79 of the Revised Code, or a remodeling or repair contract, whether written or oral, if at least ten of the following criteria apply:

(a) The individual is required to comply with instructions from the other contracting party

regarding the manner or method of performing services.

(b) The individual is required by the other contracting party to have particular training.

(c) The individual's services are integrated into the regular functioning of the other contracting party.

(d) The individual is required to perform the work personally.

(e) The individual is hired, supervised, or paid by the other contracting party.

(f) A continuing relationship exists between the individual and the other contracting party that contemplates continuing or recurring work even if the work is not full time.

(g) The individual's hours of work are established by the other contracting party.

(h) The individual is required to devote full time to the business of the other contracting party.

(i) The person is required to perform the work on the premises of the other contracting party.

(j) The individual is required to follow the order of work set by the other contracting party.

(k) The individual is required to make oral or written reports of progress to the other contracting party.

(l) The individual is paid for services on a regular basis, including hourly, weekly, or monthly.

(m) The individual's expenses are paid for by the other contracting party.

(n) The individual's tools and materials are furnished by the other contracting party.

(o) The individual is provided with the facilities used to perform services.

(p) The individual does not realize a profit or suffer a loss as a result of the services provided.

(q) The individual is not performing services for a number of employers at the same time.

(r) The individual does not make the same services available to the general public.

(s) The other contracting party has a right to discharge the individual.

(t) The individual has the right to end the relationship with the other contracting party without incurring liability pursuant to an employment contract or agreement.

2307.95 Applicability

(A) Nothing in sections 2307.92 to 2307.95 of the Revised Code is intended to do, and nothing in any of those sections shall be interpreted to do, either of the following:

(1) Affect the rights of any party in bankruptcy proceedings;

(2) Affect the ability of any person who is able to make a showing that the person satisfies the claim criteria for compensable claims or demands under a trust established pursuant to a plan of reorganization under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. Chapter 11, to make a claim or demand against that trust.

(B) Sections 2307.91 to 2307.95 of the Revised Code shall not affect the scope or operation of any workers' compensation law or veterans' benefit program or the exclusive remedy of subrogation under the provisions of that law or program and shall not authorize any lawsuit that is barred by any provision of any workers' compensation law.

(C) Except as provided in division (D) of section 2307.92 of the Revised Code and in other provisions that relate to the application of that division and the procedures and criteria it contains, nothing in sections 2307.92, 2307.93, 2307.94, and 2307.95 of the Revised Code is intended, and nothing in any of those sections shall be interpreted, to affect any wrongful death claim, as described in section 2125.01 of the Revised Code.

2307.96 Plaintiff's burden of proof in tort actions; factors considered

(A) If a plaintiff in a tort action alleges any injury or loss to person resulting from exposure to asbestos as a result of the tortious act of one or more defendants, in order to maintain a cause of action against any of those defendants based on that injury or loss, the plaintiff must prove that the conduct of that particular defendant was a substantial factor in causing the injury or loss on which the cause of action is based.

(B) A plaintiff in a tort action who alleges any injury or loss to person resulting from exposure to asbestos has the burden of proving that the plaintiff was exposed to asbestos that was manufactured, supplied, installed, or used by the defendant in the action and that the plaintiff's exposure to the defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss. In determining whether exposure to a particular defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss, the trier of fact in the action shall consider, without limitation, all of the following:

(1) The manner in which the plaintiff was exposed to the defendant's asbestos;

(2) The proximity of the defendant's asbestos to the plaintiff when the exposure to the defendant's asbestos occurred;

(3) The frequency and length of the plaintiff's exposure to the defendant's asbestos;

(4) Any factors that mitigated or enhanced the plaintiff's exposure to asbestos.

(C) This section applies only to tort actions that allege any injury or loss to person resulting from exposure to asbestos and that are brought on or after the effective date of this section.

Section 3 of 2004 Ohio Laws File 88 (Am. Sub. H.B. 292) provides:

SECTION 3. (A) The General Assembly makes the following statement of findings and intent:

(1) Asbestos claims have created an increased amount of litigation in state and federal courts that the United States Supreme Court has characterized as "an elephant mass" of cases.

(2) The current asbestos personal injury litigation system is unfair and inefficient, imposing a severe burden on litigants and taxpayers alike. A recent RAND study estimates that a total of fifty-four billion dollars have already been spent on asbestos litigation and the costs continue to mount. Compensation for asbestos claims has risen sharply since 1993. The typical claimant in an asbestos lawsuit now names sixty to seventy defendants, compared with an average of twenty named defendants two decades ago. The RAND Report also suggests that at best, only one-half of all claimants have come forward and at worst, only one-fifth have filed claims to date. Estimates of the total cost of all claims range from two hundred to two hundred sixty-five billion dollars. Tragically, plaintiffs are receiving less than forty-three cents on every dollar awarded, and sixty-five per cent of the compensation paid, thus far, has gone to claimants who are not sick.

(3) The extraordinary volume of nonmalignant asbestos cases continue to strain federal and state courts.

(a) Today, it is estimated that there are more than two hundred thousand active asbestos cases in courts nationwide. According to a recent RAND

study, over six hundred thousand people have filed asbestos claims for asbestos-related personal injuries through the end of 2000.

(b) Before 1998, five states, Mississippi, New York, West Virginia, Texas, and Ohio, accounted for nine per cent of the cases filed. However, between 1998 and 2000, these same five states handled sixty-six per cent of all filings. Today, Ohio has become a haven for asbestos claims and, as a result, is one of the top five state court venues for asbestos filings.

(c) According to testimony by Laura Hong, a partner at the law firm of Squire, Sanders & Dempsey who has been defending companies in asbestos personal injury litigation since 1985, there are at least thirty-five thousand asbestos personal injury cases pending in Ohio state courts today.

(d) If the two hundred thirty-three Ohio state court general jurisdictional judges started trying these asbestos cases today, Ms. Hong noted, each would have to try over one hundred fifty cases before retiring the current docket. That figure conservatively computes to at least one hundred fifty trial weeks or more than three years per judge to retire the current docket.

(e) The current docket, however, continues to increase at an exponential rate. According to Judge Leo Spellacy, one of two Cuyahoga County Common Pleas Court judges appointed by the Ohio Supreme Court to manage the Cuyahoga County case management order for asbestos cases, in 1999 there were approximately twelve thousand eight hundred pending asbestos cases in Cuyahoga County. However, by the end of October 2003,

there were over thirty-nine thousand pending asbestos cases. Approximately two hundred new asbestos cases are filed in Cuyahoga County every month.

(4) Nationally, asbestos personal injury litigation has already contributed to the bankruptcy of more than seventy companies, including nearly all manufacturers of asbestos textile and insulation products, and the ratio of asbestos-driven bankruptcies is accelerating.

(a) As stated by Linda Woggon, Vice President of Governmental Affairs of the Ohio Chamber of Commerce, a recent RAND study found that during the first ten months of 2002, fifteen companies facing significant asbestos-related liabilities filed for bankruptcy and more than sixty thousand jobs have been lost because of these bankruptcies. The RAND study estimates that the eventual cost of asbestos litigation could reach as high as four hundred twenty-three thousand jobs.

(b) Joseph Stiglitz, Nobel award-winning economist, in "The Impact of Asbestos Liabilities on Workers in Bankrupt Firms," calculated that bankruptcies caused by asbestos have already resulted in the loss of up to sixty thousand jobs and that each displaced worker in the bankrupt companies will lose, on average, an estimated twenty-five thousand to fifty thousand dollars in wages over the worker's career, and at least a quarter of the accumulated pension benefits.

(c) At least five Ohio-based companies have been forced into bankruptcy because of an unending flood of asbestos cases brought by claimants who are not sick.

(d) Owens Corning, a Toledo company, has been sued four hundred thousand times by plaintiffs alleging asbestos-related injury and as a result was forced to file bankruptcy. The type of job and pension loss many Toledoans have faced because of the Owens Corning bankruptcy also can be seen in nearby Licking County where, in 2000, Owens Corning laid off two hundred seventy-five workers from its Granville plant. According to a study conducted by NERA Economic Consulting in 2000, the ripple effect of those losses is predicted to result in a total loss of five hundred jobs and a fifteen-million to twenty-million dollar annual reduction in regional income.

(e) According to testimony presented by Robert Bunda, a partner at the firm of Bunda, Stutz & DeWitt in Toledo, Ohio who has been involved with the defense of asbestos cases on behalf of Owens-Illinois for twenty-four years, at least five Ohio-based companies have gone bankrupt because of the cost of paying people who are not sick. Wage losses, pension losses, and job losses have significantly affected workers for the bankrupt companies like Owens Corning, Babcox & Wilcox, North American Refractories, and A-Best Corp.

(5) The General Assembly recognizes that the vast majority of Ohio asbestos claims are filed by individuals who allege they have been exposed to asbestos and who have some physical sign of exposure to asbestos, but who do not suffer from an asbestos-related impairment. Eighty-nine per cent of asbestos claims come from people who do not have cancer. Sixty-six to ninety per cent of these non-cancer claimants are not sick. According to a Tillinghast-Towers Perrin study, ninety-four per cent of the fifty-

two thousand nine hundred asbestos claims filed in 2000 concerned claimants who are not sick. As a result, the General Assembly recognizes that reasonable medical criteria are a necessary response to the asbestos litigation crisis in this state. Medical criteria will expedite the resolution of claims brought by those sick claimants and will ensure that resources are available for those who are currently suffering from asbestos-related illnesses and for those who may become sick in the future. As stated by Dr. James Allen, a pulmonologist, Professor and Vice-Chairman of the Department of Internal Medicine at The Ohio State University, the medical criteria included in this act are reasonable criteria and are the first step toward ensuring that impaired plaintiffs are compensated. In fact, Dr. Allen noted that these criteria are minimum medical criteria. In his clinical practice, Dr. Allen stated that he always performs additional tests before assigning a diagnosis of asbestosis and would never rely solely on these medical criteria.

(6) The cost of compensating exposed individuals who are not sick jeopardizes the ability of defendants to compensate people with cancer and other serious asbestos-related diseases, now and in the future; threatens savings, retirement benefits, and jobs of the state's current and retired employees; adversely affects the communities in which these defendants operate; and impairs Ohio's economy.

(7) The public interest requires the deferring of claims of exposed individuals who are not sick in order to preserve, now and for the future, defendants' ability to compensate people who develop cancer and other serious asbestos-related injuries and to safe-

guard the jobs, benefits, and savings of the state's employees and the well being of the Ohio economy.

(B) In enacting sections 2307.91 to 2307.98 of the Revised Code, it is the intent of the General Assembly to: (1) give priority to those asbestos claimants who can demonstrate actual physical harm or illness caused by exposure to asbestos; (2) fully preserve the rights of claimants who were exposed to asbestos to pursue compensation should those claimants become impaired in the future as a result of such exposure; (3) enhance the ability of the state's judicial systems and federal judicial systems to supervise and control litigation and asbestos-related bankruptcy proceedings; and (4) conserve the scarce resources of the defendants to allow compensation of cancer victims and others who are physically impaired by exposure to asbestos while securing the right to similar compensation for those who may suffer physical impairment in the future.

No. 07-1152

IN THE

Supreme Court of the United States

CHARLES ODELL WELDON, AND ERIC A. WILES, INDIVIDUALLY, AND IN HIS CAPACITY AS EXECUTOR OF THE ESTATE OF LARRY ARNOLD WILES,
Petitioners,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION OF WRIT OF CERTIORARI

TIMOTHY J. FITZGERALD*
KEVIN C. ALEXANDERSEN
COLLEEN A. MOUNTCASTLE
HOLLY OLARCZUK-SMITH
GALLAGHER SHARP
Bulkley Building
Sixth Floor
1501 Euclid Avenue
Cleveland, OH 44115-2108
(216) 241-5310

Counsel for Respondent

* Counsel of Record

May 12, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether Ohio may require plaintiffs bringing asbestos-related claims under the Federal Employer's Liability Act and the Locomotive Inspection Act to meet minimal medical requirements, as a means of managing the dockets of Ohio's overburdened courts, without offending the Supremacy Clause, Art. VI, Cl. 2 of the United States Constitution.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULES 29.6 AND 14.1(d)

Respondent, Norfolk Southern Railway Company, is a wholly owned subsidiary of its parent corporation, Norfolk Southern Corporation, a publicly traded company. No publicly held company owns 10% or more of Norfolk Southern Corporation's stock.

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INTRODUCTION

The Petition for Writ of Certiorari raises no issue remotely worthy of review by this Court. Petitioners' principal claim – that the Ohio Revised Code sections enacted through Amended Substitute House Bill Number 292 ("H.B. 292"), Section 3(A)(3)(b), 150 Ohio Laws, Part III, 3970, are substantive state laws that "alter the evidentiary rules that long have governed claims brought under the [Federal Employers' Liability Act]" and "impose stricter threshold medical evidentiary requirements than asbestos plaintiffs would need to satisfy as a matter of substantive law to have a claim submitted to a jury or to recover under the FELA if litigated in federal court," Pet. 1 – depends upon resolving questions of both *state* and *federal* law that were neither presented to or decided by the Ohio Supreme Court, and are thus foreclosed from review by this Court. Indeed, as the state court observed, the Petitioners did not "file[] a merit brief in this case and, therefore, did not argue before this court." Pet. App. 7a.

Moreover, Petitioners' claims are improperly founded on a rejection of the Ohio Supreme Court's authoritative construction of Ohio law. The state court construed the statute to require no more than a preliminary evidentiary showing that the plaintiff had a good-faith basis for the claims asserted; this Court lacks power to adopt Petitioners' contrary construction of the state statute as imposing substantive evidentiary requirements beyond what is needed to prove the underlying claims at trial. Moreover, Petitioners' construction of the state statutes are self-evidently wrong. The Ohio statutes concern only issues of *medical* causation (i.e., whether the plaintiff has an asbestos-related

disease). Contary to Petitioners' claims, Ohio Revised Code Section 2307.92(B), for instance, has nothing to do with *legal* causation (i.e., whether a particular defendant can be held legally responsible for the injury). Furthermore, even if (contrary to fact) the statute did address legal causation, a "substantial contributing factor" standard is no stricter than the rule of proximate causation that this Court has always enforced under FELA, and thus the state statute alters no substantive rule of federal law. Petitioners' argument to the contrary is based on a misreading of *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500 (1957) – as three Justices of this Court explained in *Norfolk S. Ry. Co. v. Sorrell*, 127 S.Ct. 799 (2007). The *Sorrell* majority declined to resolve the question because the issue of the proper causation standard for railroad negligence was not raised to or decided by the state supreme court. *Id.* at 804-05. This Court should not chart a different course from *Sorrell*. Petitioners' failure to properly raise this issue in the Ohio Supreme Court compels denial of the petition.

These unresolved or foreclosed issues make this an improper vehicle to decide even the one issue that the Ohio Supreme Court did resolve – whether H.B. 292, if a procedural statute, nevertheless operates to lessen or destroy federal rights. On that question, Petitioners simply challenge the application of settled law to Ohio's statutes. There is no conflict on any issue of federal law between the holding below and any decision of this Court, a state supreme court, or a federal court of appeals. Moreover, the Ohio Supreme Court is incontrovertibly correct on the merits. H.B. 292, as construed by that court, is simply an administrative case prioritization mechanism that does not discriminate against federal claims, resolve any federal claim on the merits, or

affect or distort the adjudication of a federal claim on the merits. This Court has upheld state procedural rules that deprive a FELA plaintiff of a state forum altogether; *a fortiori*, a state procedural rule that neutrally delays adjudication of asbestos-exposed plaintiffs so that more urgent cases of plaintiffs with actual asbestos-related disease may be resolved first does not lessen or destroy federal rights in violation of the FELA. Indeed, as the Ohio Supreme Court held, very similar procedures are used to rationalize the administration of asbestos cases in federal court. In sum, this Court should deny the petition.

LEGISLATIVE BACKGROUND

A. The Purpose Of H.B. 292

This Court has characterized asbestos litigation as an "'elephantine mass'" of cases that "'defies customary judicial administration.'" *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 166 (2003). Ohio in particular has been inundated with an overwhelming number of asbestos filings, and is "one of the top five state court venues for asbestos filings." Pet. App. 70a.[1]

In 2003, at least 35,000 asbestos personal injury cases were pending in Ohio's state courts and there appeared to be no end in sight because approximately 200 new asbestos cases were being filed every month. *See id.* In eighty-nine percent of the cases no claim for cancer was alleged and "[s]ixty-six to ninety per cent of these non-cancer claimants are not sick." Pet. App. 72a-73a.[2]

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[1] All citations to H.B. 292 will be to the version of H.B. 292 reproduced in Petitioner's Appendix.

[2] *Cf. Amchem Prods. v. Windsor*, 521 U.S. 591, 631 (1997) (Breyer, J., dissenting), ("up to half of asbestos claims are now

Faced with overburdened dockets and an unending number of newly filed asbestos actions, Ohio's courts needed a mechanism to manage a large volume of asbestos cases on their dockets in a manner that ensures that sick claimants receive priority in the resolution and compensation of their claims and to weed out fraudulent claims generated by "screening" doctors hired solely to render a diagnosis for litigation.[3]

Finding that "[t]he current asbestos personal injury litigation system is unfair and inefficient, imposing a severe burden on litigants and taxpayers alike," Ohio's General Assembly enacted H.B. 292. Pet. App. 2a.

H.B. 292 went into effect on September 2, 2004. H.B. 292, 150 Ohio Laws, Part III, 3995. It enacted Ohio Revised Code Sections 2307.91 through 2307.98 to serve four primary purposes: (1) to give priority to claimants who can demonstrate actual physical harm caused by asbestos, (2) to preserve the rights of those who were exposed for future action, (3) to enhance the state's system of supervision and control over asbestos-related litigation, and (4) to conserve scarce resources to allow compensation for cancer victims while also securing a right to similar compensation

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being filed by people who have little or no physical impairment").

[3] The fraudulent practices of mass screening companies and physicians hired to diagnose claimants for the purpose of litigation was highlighted in *In re Silica Prods. Liab. Litig., MDL 1553*, 398 F.Supp.2d 563 (S.D. Tex. 2005). *In re Silica* also sheds light on the possible fraud "afflicting asbestos litigation for almost 20 years, resulting in billions of dollars of payments to claimants who weren't sick and to the attorneys who represented them." *See*, Roger Parloff, *Diagnosing For Dollars*, Fortune, June 13, 2005 at 98.

for those who suffer harm in the future. Pet. App. 74a.

The General Assembly enacted H.B. 292 as a *procedural* mechanism to enhance the ability of courts to manage and organize their dockets by prioritizing those asbestos claimants who can demonstrate impairment. *See, id.* At the same time, H.B. 292 fully preserves the rights of the unimpaired claimants to pursue their asbestos claims. *See, id.*

B. Ohio Revised Code Sections 2307.91 Through 2307.98

Ohio Revised Code §2307.92(B), enacted by H.B. 292, sets forth certain minimal medical criteria for non-malignant asbestos cases. It requires evidence that a competent medical authority took detailed occupational, asbestos-exposure, medical and smoking histories of the plaintiff, and diagnosed an asbestos-related, non-malignant condition based on those histories, as well as a medical examination and a pulmonary function test. *See,* §2307.92(B)(1)-(3). For complaints filed before the enactment of H.B. 292, like those at issue herein, these criteria were required to be filed within 120 days from the effective date of the statute. *See,* §2307.92(B) and §2307.93(A)(2).

If a plaintiff cannot meet the medical criteria, the case is administratively dismissed without prejudice. Ohio Rev. Code §2307.93(C). Under this procedure, the trial court retains jurisdiction over the case. The claim is preserved for purposes of the statute of limitations, and the dismissal does not count against the plaintiff. The case can be reinstated when the plaintiff complies with §2307.92(B).

H.B. 292 expedites the resolution of claims brought by truly sick claimants. Pet. 73a. *All* asbestos

claimants, including FELA and Locomotive Boiler Inspection Act ("LBIA") claimants, must meet these procedural medical requirements at the early stage of litigation in order to prioritize the cases on the trial court docket.

STATEMENT OF THE CASE

In September 1999, Petitioners, Charles Odell Weldon, and Eric A. Wiles, individually and in his capacity as executor of the Estate of Larry Arnold Wiles ("Petitioners"), filed complaints under the FELA and the LBIA against Respondent, Norfolk Southern Railway Company ("Respondent" or "Norfolk Southern") in the Cuyahoga County Court of Common Pleas alleging injuries caused by occupational exposure to asbestos during their employment with the railroad. Petitioners, who were residents of Salisbury, North Carolina at the time of filing their asbestos-related actions and did not work for the respondent in Ohio, had no connection with Ohio.

Petitioners failed to file the written medical reports and supporting test results required by Ohio Revised Code §2307.92(B). Due to Petitioners' failure to comply with these requirements, Norfolk Southern brought an action seeking a judgment declaring that: (1) the medical criteria and the administrative dismissal process contained in H.B. 292 applies to Petitioners' asbestos-related FELA/LBIA claims, and that (2) H.B. 292 does not infringe upon the Supremacy Clause of the United States Constitution, U.S. Const. Art. VI, Cl. 2.

The trial court denied Norfolk Southern's request for declaratory relief. The trial court determined that the application of H.B. 292 to the instant cases was preempted by the FELA and the LBIA. Pet. App.

32a-33a. The Eighth District Court of Appeals affirmed. *Norfolk S. Ry. Co. v. Bogle*, 850 N.E.2d 1281 (Ohio App. 2006). Pet. App. 31a.

The Supreme Court of Ohio reversed and remanded the trial and appellate courts' decisions. Pet. App. 15a. The court held that the prima-facie requirements contained in §2307.92 and the administrative dismissal mechanism contained in §2307.93, are procedural in nature and can be applied to claims brought in state court under the FELA and the LBIA, and that since no new substantive burdens are placed on asbestos claimants, these procedural statutes are not preempted by federal law. "[T]he impact of these statutes is to establish a procedural prioritization of the asbestos-related cases on the court's docket. Nothing more." Pet. App. 7a. The court further acknowledged that Ohio Revised Code Sections 2307.92 and 2307.93 "apply to all asbestos claims filed in Ohio regardless of the theory or statutory basis giving rise to relief, and serve to make efficient use of judicial resources." Pet. App.15a.

REASONS WHY THE PETITION SHOULD BE DENIED

A. Petitioner's Claim That The Statute Conflicts With FELA Causation Rules Is Not Preserved For This Court's Review.

Petitioner's principal contention is that H.B. 292 imposes a higher standard of legal causation at the early stages of litigation ("substantial contributing factor") than a FELA plaintiff needs to satisfy in adjudicating its claim on the merits against the railroad. Pet. 1, 14-18. Petitioners' position is erroneous as a matter of both state and federal law, but more fundamentally it is not preserved for this Court's review. This Court does not sit to decide

questions of state law, nor does it sit to review questions that were not decided by or presented to the Ohio Supreme Court below. *Illinois v. Gates*, 462 U.S. 213, 218 (1983).

Petitioners disregard their obligations under Sup. Ct. Rule 14(g)(i). In seeking review of the Supreme Court of Ohio's decision, they fail to specify in the statement of the case:

> the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears ***, so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

The reason for Petitioners' default is clear: the questions Petitioners now raise were not properly presented below. Petitioners did not ask the Ohio Supreme Court to render a construction of the term "substantial contributing factor" defined in Ohio Rev. Code §2307.92(B), nor did they argue to the court that the statute conflicted with any substantive FELA causation rule.[4] Norfolk Southern's position that H.B. 292 is procedural and therefore consistent with *Rogers* was uncontested before the Ohio

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[4] As noted above, Petitioners did not timely file a brief in the Ohio Supreme Court. Pet. App. 7a. While Petitioners did briefly raise the substantive-conflict argument to the court of appeals, they failed to properly renew that argument in the Ohio Supreme Court.

Supreme Court because of Petitioners' failure to diligently participate in the proceedings before the state supreme court.[5]

It is not this Court's province to decide threshold and potentially dispositive issues of state law. *See, Limbach v. Hoover & Allison*, 466 U.S. 353 (1984); *Green v. Frazier*, 253 U.S. 233 (1920). The Ohio Supreme Court authoritatively construed the state statute as placing "no new substantive burdens" on any claimant, regardless of the applicable law. Pet. App. 8a. Indeed, it construed the medical certification requirements of Ohio Revised Code §2307.92(B) to demand in substance no more than the existing procedural rule that "requires a party to certify, by signing a complaint, that there are 'good grounds to support it.'" Pet. App. 8a.

Remarkably, Petitioners dispute the Ohio Supreme Court's interpretation of state law. Arguing only from the text of the state statute, Petitioners argue (1) that the "substantial contributing factor" provision in §2307.92(B) defines an independent substantive standard of Ohio law (i.e., that it does not merely require medical certification of facts necessary to support a claim under the applicable substantive law, as the Ohio Supreme Court held), and (2) requires a certain quantum of evidence of legal causation that is higher than FELA requires for the plaintiff to prevail on the merits. But a state supreme court's construction of a state statute is authoritative and "[n]either this Court nor any other

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[5] The Ohio court of appeals likewise did not construe H.B. 292 as imposing substantive evidentiary burdens in conflict with *Rogers*; it simply found the delay entailed in the statutory procedures to "gnaw" at the roots of the federal right. Pet. App. 29a.

federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997). Additionally, the term "substantial contributing factor" is expressly defined in the state statute, Ohio Rev. Code §2307.91(FF), and it is unknown what gloss the state supreme court would place on those terms; absent an authoritative construction of that statutory definition, this Court cannot feasibly compare the state and federal laws. If Petitioners quarrel with the Ohio Supreme Court's construction of state law, they have only themselves to blame; they forfeited the opportunity to argue the construction of the state statute by failing to file a timely brief. Because Petitioners' federal claims derive from a construction of the state statute that was neither presented to nor adopted by the Ohio Supreme Court, and indeed requires a construction of state law contrary to the one adopted below, this Court cannot entertain them.

Moreover, Petitioners are simply wrong in claiming that Ohio Revised Code §2307.92(B)(2) states a rule of legal causation, much less one in conflict with any FELA rule. H.B. 292 addresses *medical causation*: whether any asbestos exposure was a substantial contributing factor to the claimed disease. Many symptoms alleged in asbestos litigation can be caused by numerous other agents or health conditions. *See, In re R.O.C.*, 131 S.W.3d 131, 137 (Tex. Ct. App. 2004). The object of H.B. 292 is simply to require a prima-facie showing that "a competent medical authority" has determined that the plaintiff has a true asbestos-related disease. Ohio Rev. Code §2307.92(B). The Ohio Supreme Court did not construe the state statute to require anything more than is necessary for a medical diagnosis that the

injury was attributable to asbestos as opposed to other factors. There is certainly no conflict with the FELA if §2307.92(B) is properly construed, as the Ohio Supreme Court did, as requiring a threshold prima-facie showing of asbestos-related disease. This Court has expressly held that a FELA plaintiff may only recover against a railroad that negligently exposed him to asbestos if he developed an asbestos-related disease. *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 427 (1997).

The medical-causation requirement of §2307.92(B), which goes to the nature of the injury (is it asbestos-related disease or not), has nothing to do with *legal causation*, which is the question of whether a specific defendant can be held legally responsible for the injury in question. *See*, Restatement (Second) of Torts § 435 (1965). §2307.92(B) is wholly silent on that question. Even if *arguendo Rogers* stated a reduced legal-causation standard for railroad negligence, it would be completely compatible with §2307.92(B). The complaint would be placed on the active docket if it were shown that the plaintiff had an asbestos-related disease (i.e., that asbestos exposure was a substantial contributing factor to the disease); the railroad (under a *Rogers* standard) would be liable if its negligent acts exposing the defendant to asbestos played any part, even the slightest, in causing the asbestos-related disease, even if other defendants were responsible for a much greater amount of the plaintiff's asbestos exposure.[6]

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[6] In a footnote, Pet. 15 n.6, Petitioners argue that there is no possible FELA standard of legal causation as stringent as "substantial contributing factor." That is incorrect. Even if *arguendo* Ohio Revised Code §2307.92(B)(2) addressed legal causation, it would not be materially different from the "substantial factor" standard of Section 435 of the Restatement.

This points to a second fundamental flaw in the petition. Not only did Petitioners fail to properly present their *state law* construction of §2307.92(B) to the Ohio Supreme Court, but they never raised the *federal law* argument that *Rogers* abolished the federal rule of proximate cause in FELA actions in the courts below. Just last term, this Court refused to address this question when it had not been passed on by or presented to the Missouri Supreme Court. *Sorrell*, 127 S.Ct. at 804-05. There is no reason for a different result here; indeed, declination of review is even more necessary here because that important issue should be resolved in the context of an actual adjudication where causation is in dispute between the parties.

Moreover, Petitioners' claim that the FELA abrogated the doctrine of proximate cause in favor of a "slightest cause" standard (Pet. 14-15) is false. While *Rogers* rejected a particular state common-law conception of "proximate cause" that required a showing that the railroad's wrongful act was the "sole, efficient, producing cause of injury," 352 U.S. at 506, it has always been the rule in this Court's FELA precedents (before and after *Rogers*) that the plaintiff must prove that the railroad's negligence was either "the sole or a contributory proximate cause." *Coray v. Southern Pac. Co.*, 335 U.S. 520, 523 (1949); *Brady v. Southern Ry. Co.*, 320 U.S. 476, 483 (1943); *Kernan v. American Dredging Co.*, 355 U.S. 426, 434 (1958).[7]

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[7] *See, e.g., Lang v. New York Cent. R.R.*, 255 U.S. 455, 461 (1921) (reversing for lack of evidence of proximate cause); *St. Louis-S.F. Ry. v. Mills*, 271 U.S. 344, 347 (1926) (same); *Northwestern Pac. R.R. v. Bobo*, 290 U.S. 499, 503 (1934) (same); *see also, e.g., St. Louis, Iron Mountain & S. Ry. v. McWhirter*, 229 U.S. 265, 280 (1913); *Davis v. Wolfe*, 263 U.S. 239, 243 (1923); *Davis v. Kennedy*, 266 U.S. 147, 148 (1924); *Minneapolis,*

As three justices explained in *Sorrell*, *Rogers* did not overrule the host of precedents applying proximate cause as the standard on which the jury must be instructed; it simply defined the standard for a jury question in cases involving multiple possible proximate causes. *Sorrell*, 127 S.Ct. at 809 (Souter, J. concurring.)

This Court cannot resolve the petition without deciding that (1) Ohio Revised Code Section 2307.92(B) requires a threshold prima-facie showing that is stricter than the federal legal causation standard under the FELA, and (2) that *Rogers* imposed a "slightest cause" standard that requires less proof than a "substantial contributing factor." Petitioners' interpretations of both state and federal law are flatly wrong and contrary to this Court's precedent, but more importantly they are not preserved for this Court's review because they were not properly before the court below. Moreover, the Ohio Supreme Court authoritatively construed the state statute not to require greater threshold evidentiary showings on any substantive element – whether injury or causation – than would be required to prove a FELA claim on the merits, and Petitioners cannot contest that construction in this Court. Certiorari should be denied.

St. Paul & Sault Ste. Marie Ry. v. Goneau, 269 U.S. 406, 409-10 (1926); *New York Cent. R.R. v. Ambrose*, 280 U.S. 486, 489 (1930); *Swinson v. Chicago, St. Paul, Minneapolis & Omaha Ry.*, 294 U.S. 529, 531 (1935); *Brady v. Terminal R.R. Ass'n*, 303 U.S. 10, 15 (1938); *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 67 (1943); *Coray*, 335 U.S. at 523 (1949); *Urie v. Thompson*, 337 U.S. 163, 195 (1949); *O'Donnell v. Elgin, Joliet & E. Ry.*, 338 U.S. 384, 390 (1949); *Carter v. Atlantic & St. Andrews Bay Ry.*, 338 U.S. 430, 434-35 (1949); *Brown v. Western Ry. of Ala.*, 338 U.S. 294, 297-98 (1949).

B. The Ohio Supreme Court's Ruling That The Statute Does Not Burden Federal Rights Is Correct And Does Not Conflict With Any Other Decision.

Yet another flaw in the petition is its confusion regarding this Court's "reverse-*Erie*" pre-emption precedents. The petition suggests that there are two distinct lines of federal preemption precedent: it claims that the Ohio Supreme Court's determination that §2307.92(B) is procedural runs afoul of *Felder v. Casey*, 487 U.S. 131 (1988), Pet. 14-18, and, in the alternative, even if §2307.92(B) is procedural, the decision below offends *Brown v. Western Ry. of Ala.*, 338 U.S. 294 (1949), *Norfolk Southern R.R. v. Ferebee*, 238 U.S. 269 (1915), and other FELA precedents of this Court holding that substantive federal rights "cannot be lessened or destroyed by a rule of practice," *Id.* at 273. Pet. 18-25.

Petitioners' analysis is unsound. The preemption standard is substantively the same in *Felder*, *Brown*, and *Ferebee* even though the Court at times uses different verbal formulations. Indeed, *Felder* specifically and repeatedly invoked *Brown* as the preemption rule that resolved the case, *Felder*, 487 U.S. at 138, 150, 152, and specifically held that *Brown* applied in substance the same "outcome-determinative" test established in *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945) for classic *Erie* issues. *Felder* held that a state

> may not alter the outcome of federal claims it chooses to entertain in its courts by demanding compliance with outcome-determinative rules that are inapplicable when such claims are brought in federal court, for "'[w]hatever spring the State may set for those who are endeavoring to assert rights that the State confers, the

> assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.'" *Brown v. Western R. Co. of Alabama*, *supra*, 338 U.S., at 298-299, 70 S.Ct., at 108 (quoting *Davis v. Wechsler*, 263 U.S. 22, 24, 44 S.Ct. 13, 14, 68 L.Ed. 143 (1923)).

Felder, 487 U.S. at 152.

Accordingly, Petitioners' complaint that the Ohio Supreme Court cited an Ohio case for the definition of when a case is procedural or substantive, Pet. 12 & n.4, is of no moment. As the Ohio Supreme Court correctly ruled, the characterization of a law as procedural "does not end the analysis, because procedural rules apply to federal claims only so long as they do not operate to impair a claimant's ability to enforce a federal right or cause of action." Pet. App. 8a (citing *Davis* and *Brown*). There is thus no conflict with *Felder* or any other precedent of this Court on the preemption standard to be applied. At the end of the day, Petitioners assert only error in the application of settled law to the issue at hand, which does not warrant this Court's review.

Nor does the Ohio Supreme Court's application of the preemption rule create any conflict with any decision of this Court or any other. As an initial matter, the same vehicle problems that foreclose review of part I.A of the petition also foreclose review of part I.B. Petitioners' claim in part I.B that Ohio Revised Code Section 2307.92(B) lessens and destroys federal rights in violation of *Brown* and *Ferrebee* by "impos[ing] preliminary evidentiary burdens that exceed the showings a FELA plaintiff would be required to make at trial or in federal court." Pet. 19. This self-serving construction of H.B. 292 was not properly presented to the Ohio Supreme Court.

Moreover, Petitioners' arguments that §2307.92(B) burdens federal rights is simply based on a misconception of the nature and operation of the statute.

Finally, review of Part II of the petition is unavailing for the simple reason that no conflict or confusion exists among state high courts on the issues addressed in the Supreme Court of Ohio's decision.

1. Petitioners Misstate The Legislative Intent Of H.B. 292.

Petitioners argue repeatedly that the primary purpose of H.B. 292 is to "reduce total liability paid by defendants in connection with asbestos claims." *See*, Pet. at 6, 12. Petitioners erroneously represent the "sole" purpose of H.B. 292 as protection of companies from bankruptcy and to diminish corporations' liability for asbestos-related actions.

Petitioners are grasping at straws. There is no basis for Petitioners' attempt to link a concern about rising bankruptcies with any substantive impairment of federal rights. The Ohio General Assembly's concern was the waste of corporate assets in defending the mass filings of plaintiffs who are not sick and the possibility that the funds will run out before sick plaintiffs can be compensated; indeed, more than half of the $54 billion expended in asbestos suits is absorbed by litigation costs. Pet. App. 69a-71a. This hardly translates into impairment of federal rights, when only asbestos-related disease caused by railroad negligence is compensable under FELA. *Metro-North*, 521 U.S. at 427.

Significantly, Petitioners' omit from discussion the additional sound public policy reasons behind the Ohio General Assembly's enactment of H.B. 292

which are expressly in the bill. *See*, Pet. App. 69a-74a. The four primary purposes of the statutes are: (1) to give priority to those claimants who can demonstrate actual physical harm caused by asbestos, (2) to preserve the rights of those who were exposed for future action, (3) to enhance the state's system of supervision and control over asbestos-related litigation, and (4) to conserve the scarce resources of the defendants to allow compensation for cancer victims while also securing a right to similar compensation for those who suffer harm in the future. Pet. App. 74a.

The medical criteria and administrative dismissal process of H.B. 292 are procedural and were enacted in response to the asbestos litigation crisis in Ohio. *Id.* The legislative findings and history demonstrate that Ohio Revised Code Sections 2307.92(B) and 2307.93(C) are intended to manage the procedural aspects of asbestos cases by prioritizing these cases through the use of medical criteria and the administrative dismissal process. *See*, Pet. App. 74a. Since these requirements are procedural and not substantive, they are applicable to asbestos-related FELA/LBIA claims filed in state court without offending the Supremacy Clause. U.S. Const. Art. VI, Cl. 2.

2. The Decision Below Does Not Conflict With Decisions Of This Court.

As this Court has stated repeatedly,

> "The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the state create a court competent to hear the case in which the federal claim is presented. The general rule, 'bottomed

> deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.' The states thus have great latitude to establish the structure and jurisdiction of their own courts."

Johnson, 520 U.S. at 919, citing, *Howlett v. Rose*, 496 U.S. 356 (1990), internal quotations omitted. H.B. 292 falls within the State's purview to establish the structure of its own courts. The decision below is not comparable to any of this Court's decisions which have struck down statutes that either imposed substantive law requirements or outcome-determinative procedures that could result in dismissal with prejudice or a judgment in favor of the defendant.

The Ohio Supreme Court's decision does not conflict with *Felder v. Casey*. Under the Wisconsin statute in *Felder*, notice of intent to file a 42 U.S.C. §1983 claim was to be provided to the defendant-governmental entity 120 days *prior* to filing a lawsuit. A civil rights claimant had to seek satisfaction in the first instance from the governmental defendant prior to filing suit.

In striking down the Wisconsin statute, this Court determined that the notice-of-claim statute "confer[ed] on governmental defendants an affirmative defense" that could result in dismissal with prejudice. *See Felder*, 487 U.S. at 144. The statute was outcome-determinative because it could result in a judgment on the merits for defendants. *See, id.* The Court held that the statute effectively changed the substantive elements of the cause of action. *See, id.*

In contrast to the Wisconsin statute, H.B. 292 does not alter the substantive elements of FELA claims or defenses or otherwise slant the adjudication of the claim on the merits in favor of the defendant. Failure to meet the requisite medical criteria under H.B. 292

results in an administrative dismissal *without prejudice*. *See*, Ohio Rev. Code §2307.93(C). A plaintiff's claim is afforded several protections under this procedure: the administrative dismissal does not effect the merits of plaintiff's claim, and the claim is preserved for purposes of the statute of limitations. *Id.* Also, the case can be reinstated on the trial court docket when the plaintiff complies with §2307.92(B).

Because the Ohio Supreme Court authoritatively construed H.B. 292 to do "[n]othing more" than "establish a procedural prioritization of the asbestos-related cases on the court's docket," Pet. App. 7a, it is also fully distinguishable from this Court's precedents holding that FELA preempts local substantive standards governing the burden of proof and the review of jury verdicts in adjudication on the merits. *See*, *Brady*, 320 U.S. at 479, (requiring federal standard of sufficiency of evidence to establish FELA liability); *Central Vt. Ry. v. White*, 238 U.S. 507, 512 (1915) (state rule regarding burden of proof of contributory negligence preempted); *New Orleans & N.E.R.R. v. Harris*, 247 U.S. 367 (1918) (Mississippi statute creating a "presumption of negligence" against the railroad preempted); *Dice v. Akron, D.&Y.R. Co.*, 342 U.S. 359, 363 (1952) (preempting state rule that judges and not juries decide issues of fraud in the execution of a release because "depriv[ing] railroad workers of the benefit of a jury trial where there is evidence to support negligence is to take away a goodly portion of the relief which congress has afforded to them). H.B. 292 does not alter the adjudication of FELA claims on the merits, limit jury powers, define burdens of proof, or set standards for sufficiency of the evidence. H.B. 292 merely provides for the procedural mechanism by which a plaintiff must certify the evidence supporting

a claim that the defendant's negligence resulted in asbestos-related disease. No final determination relating to any portion of a plaintiff's FELA claim is made under H.B. 292.

Petitioners' reliance on *Brown v. Western Ry. of Alabama* is similarly misguided. The holding in Brown is limited to the facts of that case. *See*, 338 U.S. at 299. In *Brown*, a federal right was defeated by Georgia's local rules. *See*, *id.* at 296. The rule of practice in *Brown* was severely weighted against the plaintiff in that a mere technical failure to properly plead the case resulted in a dismissal with prejudice of the plaintiff's FELA claim, precluding future recovery.

H.B. 292 does not result in a dismissal with prejudice. "A claimant who fails to comply with the requirements faces administrative dismissal *without* prejudice, and the case effectively becomes "inactive" for purposes of discovery and trial." Ohio Rev. Code §2307.93(C), Pet. App. 13a. As noted above, the Ohio Supreme Court held that the requirements of H.B. 292 do not impose any new substantive burdens on plaintiffs because under Rule 11 of the Ohio Civil Rules of Procedure, a party or an attorney is already required to certify, by signing a complaint, that "good grounds" exist for the lawsuit. Pet. App. 8a. H.B. 292 simply requires the plaintiff to produce the documentation that supports the already-required good grounds for bringing the claim in the first place.

What further distinguishes H.B. 292 from the rule at issue in *Brown* is that FELA asbestos actions filed in state and federal courts are subject to similar procedures used to facilitate, manage, and organize asbestos FELA/LBIA cases. Pet. App. 14a. Despite Petitioners' arguments to the contrary, preservation of a claim until proper evidence to support the claim

is produced, is a far cry from "de facto dismissal with prejudice." *See*, Pet. 20. H.B. 292 does not affect the merits of the asbestos-plaintiff's claim.

H.B. 292's function is to manage and organize the docket of Ohio courts by prioritizing asbestos claims. It allows claimants who can demonstrate impairment to bring forth their evidence before non-impaired claimants can do so. At the same time, H.B. 292 fully preserves the rights of the unimpaired claimants to pursue their asbestos claims. Such requirements do not conflict with the decisions of this Court.

3. The Supreme Court Of Ohio Did Not Err In Relying On This Court's Analysis In *Bombolis* And *Mayfield*.

Because H.B. 292 is strictly a procedural statute that does not impair substantive rights, it is fully within the domain of state laws that apply in FELA actions in state court. *St. Louis Sw. Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985). The Ohio Supreme Court correctly invoked *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1960), which upheld an outcome-neutral rule that jury verdicts need not be unanimous. Petitioners question the authoritativeness of *Bombolis*, but it has not been overruled by this Court and remains good law.

The Ohio Supreme Court also cited to *Missouri ex rel. S. Ry. Co. v. Mayfield*, 340 U.S. 1 (1950), to compare the forum non conveniens doctrine to the procedural requirements of H.B. 292. As stated by the Supreme Court of Ohio, states can employ the doctrine of forum non conveniens so long as the application does not work to discriminate against federal claims. "[N]othing in the FELA purport[s] 'to force a duty' upon the state courts to entertain or

retain Federal Employers' Liability litigation 'against an otherwise valid excuse.'" Pet. App. 10a.

If a state court can apply the doctrine of forum non conveniens to FELA claims to eliminate such a claim from its dockets, certainly Ohio can apply H.B. 292 to FELA claims because it does not create such a harsh result. The provisions of H.B. 292 provide the means by which Ohio's courts can prioritize and manage its dockets. A FELA/LBIA plaintiff's asbestos-related action is retained by Ohio's courts and measures of protection of the claim are provided under the statutory provisions enacted by H.B. 292.

In questioning the Ohio Supreme Court's decision, Petitioners ignore *Johnson v. Fankell*, upon which the Ohio court also relied. In *Johnson*, this Court upheld a state court procedural rule that differed from a federal rule.

In *Johnson*, the defendant filed a motion to dismiss a §1983 action pending in state court based on a qualified immunity defense. The trial court denied the motion and the defendant appealed. The state court dismissed the appeal.

If the §1983 action had been filed in federal court, a denial of the motion to dismiss would be immediately appealable. *See, Johnson*, 520 U.S. at 915. The defendant in *Johnson* argued that because the plaintiff asserted a federal claim under a federal statute, and the defendants were asserting a defense provided by federal law, then the state court must allow the same interlocutory appeal available in federal court. The defendant in *Johnson* argued, like Petitioners argue, that preemption was necessary to avoid different outcomes in state and federal courts in §1983 litigation. *See id.* at 918. This Court disagreed, upholding the state court's interpretation

of its procedural rules relating to the ability to appeal. This Court reasoned that states have great latitude to establish the structure and jurisdiction of their own courts. *See, id.* at 919, citing, *Howlett*, 496 U.S. 356.

Contrary to Petitioners' position, H.B. 292's requirements do not burden a FELA/LBIA plaintiff's substantive federal rights, and thus, the Ohio Supreme Court did not err in applying these requirements to Petitioners' asbestos-related FELA/LBIA actions filed in Ohio's courts.

4. Petitioners' FELA/LBIA Asbestos Actions Would Be Subject To A Process Of Prioritizing And Administrative Dismissal In Federal Court.

Petitioners argue that H.B. 292 creates a disparity between asbestos-related FELA/LBIA claims filed in state and federal courts within Ohio. This statement is incorrect because when a plaintiff files an asbestos-related FELA/LBIA claim in federal court, the case is transferred to a special multi-district litigation docket for handling. If the asbestos action does not meet the requirements for active processing, it is administratively dismissed until the plaintiff is able to satisfy the certain requirements.

For many years, federal courts have utilized a mechanism for managing and organizing asbestos cases similar to the framework in H.B. 292. *See, Smith v. Gulf Oil Co.*, 995 F.2d 638, 639 (6th Cir. 1993) (In 1987, the Northern District of Ohio created a special Maritime Asbestos Litigation Docket, "MARDOC.") All asbestos-related claims filed in Ohio's federal courts are transferred to the Judicial Panel on Multi-District Litigation at Civil Action No. MDL 875 ("MDL 875"). *See, In re Asbestos Prod.*

Liab. Litig., 771 F.Supp. 415, 422-23 (J.P.M.L. 1991). The case management order that governs MDL 875, Administrative Order No. 8, sets forth a mechanism for managing and organizing asbestos cases similar to the framework in H.B. 292. *In re Asbestos Prods. Liab. Litig.*, No. MDL 875, 2002 WL 32151574, *1 (E.D. Pa. Jan. 16, 2002).

Administrative Order No. 8 states:

> "The Court has the responsibility to administratively manage these cases so as to protect the rights of all parties, yet preserve and maintain any funds available for compensation to victims."

Similar concerns relating to the preservation of funds for those who are most sick were expressed by Ohio's General Assembly. *See,* Pet. App. 72a-74a.

Administrative Order No. 8 gives priority to malignant and other serious health cases over asymptomatic claims. *Compare,* Pet. App. 74a. Administrative Order No. 8 acknowledges the importance of "doctor-patient medical report[s] setting forth an asbestos related disease." Similarly, Ohio Revised Code §2307.91(Z)(2) requires the doctor diagnosing the alleged asbestos-related disease to be a "medical doctor [who] is actually treating *** the exposed person."

Administrative Order No. 8 expresses concern with suits instituted as a result of "report[s] to attorney[s] from a screening company *** because *** a suit is then commenced without verification. Often times these suits are brought on behalf of individuals who are asymptomatic as to an asbestos-related illness and may not suffer any symptoms in the future." The Ohio General Assembly expressed these same concerns in H.B. 292 (A)(5) and addressed this issue

by enacting Ohio Revised Code §2307.91(Z)(3)(c), which states that a doctor who diagnoses an asbestos related impairment cannot rely on law firm sponsored screening reports.

Administrative Order No. 8 and H.B. 292 are similar in several respects: (1) both seek to give priority to cases where the asbestos-related impairment is diagnosed through a doctor-patient relationship and not through law firm sponsored screenings; (2) both seek to give priority to and preserve resources for those plaintiffs who are most sick; (3) both provide for an administrative dismissal of those cases not meeting the requirements; (4) both preserve the claim for purposes of statute of limitations if the case is administratively dismissed; (5) both retain jurisdiction over administratively dismissed actions; and (6) both permit the plaintiff to move to reinstate his/her case upon showing evidence of asbestos exposure and evidence of an asbestos-related disease.

It is disingenuous for Petitioners to dismiss the significance of Administrative Order No. 8 in MDL 875 as a "single district court decision." Pet. 24. Any pending asbestos actions not in trial at the time of MDL 875's creation were transferred to MDL 875 for handling. *In re Asbestos*, 771 F.Supp. at 424. Asbestos actions from 87 federal districts were transferred to MDL 875, and subject to Administrative Order No. 8. *See, id.* at 416. Any plaintiff who files an asbestos-related FELA claim in any these 87 federal courts must meet the requisite requirements for active processing.

The Ohio Supreme Court found its ruling of non-preemption "fortified" because the federal MDL court had adopted "a similar method to prioritize asbestos-related cases." Pet. App. 14a. Although the Ohio

statute is more detailed, both similarly required "'a doctor-patient medical report setting forth an asbestos-related disease.'" *Id.*, quoting *In re Asbestos Prods. Liab. Litig.*, No. MDL 875, 2002 WL 32151574, *1 (E.D. Pa. Jan. 16, 2002). Petitioners' contention that the federal and Ohio procedures are dissimilar is based solely on their impermissible contrary construction of the state statute as imposing additional substantive requirements. Pet. 24-25.

The procedure implemented in federal court has never been found to be in conflict with or frustrate the FELA or the LBIA. Had the FELA/LBIA actions at issue been filed in federal court, Petitioners would have been subject to the federal process of prioritizing and administrative dismissal of cases, which is similar to the requirements of H.B. 292.

5. The Ohio Supreme Court's Decision Does Not Conflict With Or Demonstrate Confusion Among State High Courts.

Petitioners cannot allege any direct conflict with any decision of any other state supreme court (or federal court of appeals). Instead, they speak vaguely of "confusion in state courts regarding FELA preemption" and the need for uniformity.

As an initial matter, review of the Ohio Supreme Court's decision here will not create "uniformity" on these issues. To the extent that there is any confusion (and Petitioners demonstrate none), at most such confusion would "'point up the impossibility of laying down a precise rule to distinguish "substance" from "procedure."'" *St. Louis Sw. Ry. Co.*, 470 U.S. at 411, quoting *Brown*, 338 U.S. at 296. This case is no different and its review by this Court does not alter the realization, expressed in

Dickerson, that uniformity in this area is an "impossibility."

Petitioners' attempt to create a conflict with *Daimler Chrysler Corp v. Ferrante*, 637 S.E.2d 659 (Ga. 2006) is also misplaced. The Ohio Supreme Court's decision does not conflict with *Ferrante* because, although both cases analyze state statutes establishing minimum criteria for asbestos-related claims, there are significant differences in how asbestos cases are handled when threshold requirements are unmet.

Such cases in Ohio are administratively dismissed, "a procedure by which the case is essentially rendered inactive, but the court retains jurisdiction over the matter." Pet. App. 3a, citing Ohio Rev. Code §2307.93(C). "A claimant may reinstate the case if the claimant 'makes a prima-facie showing that meets the statutory minimum medical requirements.'" *Id.*

By contrast, in Georgia, a case not in compliance with the statute is dismissed out right, albeit "without prejudice." *See*, OCGA §51-14-5(a). The claim is not preserved for purposes of the applicable statute of limitations. For that reason, the law in Georgia does impair a substantive right, unlike the law in Ohio. Therefore, no conflict exists between the Georgia Supreme Court treatment of its asbestos law and the Ohio Supreme Court's treatment of H.B. 292. This Court does not issue advisory opinions. *Powerex Corp. v. Reliant Energy Servs., Inc.*, 127 S.Ct. 2411, 2419 (2007). Granting certiorari here will only give rise to the Court's issuance of an advisory opinion on a question that is not properly before it. *Alabama v. Shelton*, 553 U.S. 654, 676 (2004) (Scalia, J., dissenting); *Republic Nat'l Bank of Miami v. United*

States, 506 U.S. 80, 99 (1992) (Thomas, J., concurring.)

On those occasions when this Court has agreed to hear appeals based upon conflicts between decisions of the highest state courts on a federal question, it has done so when there is a conflict that concerns the same federal question. *See, e.g., Illinois v. Lidster*, 540 U.S. 419, 423 (2004); *Illinois v. Wardlow*, 528 U.S. 119, 123, f.n. 1 (2000); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780, f.n. 10 (1981); *Citizens & S. Nat'l Bank v. Bougas*, 434 U.S. 35, 40-41 (1977). This is not such a case. The decisions cited by Petitioners as indicative of supposed confusion among and conflict between the state high courts are not on the same issue decided by the Ohio Supreme Court. There is no conflict or confusion resulting from the Ohio Supreme Court's decision.

Unlike the cases cited by Petitioners, the application of H.B. 292's prioritization of asbestos litigation does not implicate the merits of FELA/LBIA asbestos claims or impair the ability to recover in FELA/LBIA cases. The issue before the Ohio Supreme Court did not necessitate an analysis of sufficiency of evidence or general standards of proof that dictate whether an FELA/LBIA plaintiff can recover. This case is easily distinguishable from the line of cases cited by Petitioners that dealt with those precise substantive issues impacting the ability to recover on FELA claims. *See, Montgomery v. CSX Transp., Inc.*, 656 S.E.2d 20 (S.C. 2008); *Haselden v. Atlantic Coast Line R.R. Co.*, 53 S.E.2d 60 (S.C. 1949); *Union Pac. R.R. Co. v. Williams*, 85 S.W.3d 162 (Tex. 2002); *McMillan v. National R.R. Passenger Corp.*, 648 A.2d 428 (D.C. 1994); *Adair v. Northern Pac. Ry. Co.*, 392 P.2d 830 (Wash. 1964); *Kauzlarich*

v. Atchison, T. & S.F. Ry., 910 S.W.2d 254 (Mo. 1995). Indeed, the statute forecloses any use of the prima-facie certification at trial on the merits as evidence, evidentiary presumption, or as the basis for any disposition on the merits. Pet. App. 57a-58a. In accord with the general principles set forth in these cases, the Ohio Supreme Court recognized that the FELA/LBIA preempts state substantive regulation. Pet. App. 5a. No conflict or confusion is present on this issue.

Nor is any conflict between the decision below and a "second line of state high courts" that Petitioners characterize as holding "that a conclusion that a rule is procedural is the beginning and end of the inquiry as to whether a rule may be applied to FELA claims." Pet. 27. First, if there were any such "second line" of cases, they would already be overruled by *Brown*; there is no need for this Court to grant review in this case to pronounce on the undisputed error of other courts. Second, there is no such "second line" of cases stating such a categorical position. For example, *Allen v. National R.R. Passenger Corp.*, 934 So. 2d 1006 (Miss. 2006), simply holds that a state court can issue discovery sanctions under state law even if they cost the plaintiff his substantive rights: "[t]hat Allen's substantive rights were affected when his case was dismissed is without doubt, but such is the nature and purpose of sanctions for discovery violations and hindering the discovery of truth in a lawsuit." *Id.* at 1015.

In *Rule v. Burlington N. & Santa Fe Ry.*, 106 P.3d 533 (Mont. 2005), the court did not assess the burden on FELA rights as a result of application of the state's venue rules because this Court had already held that applying a state's venue rules to FELA cases is permissible. *Id.* at 536, quoting *Miles v.*

Illinois Cent. R.R. Co., 315 U.S. 698, 703 (1942). Similarly, no assessment of the burden of FELA rights needed to be made in *Alabama Great S. R.R. v. Jackson*, 587 So. 2d 959 (Ala. 1991) because, in the end, the court held that, even under the states "substantial evidence" rule, the plaintiff has presented sufficient evidence to sustain his claim of negligent infliction of emotional distress in an FELA case. *Id.* at 964. There is not a "second line of state high courts" that have created a different test for determining whether a state's procedural rules unduly impact FELA rights. Plaintiffs' claim of a conflict of authority on FELA preemption is strained.

As there is no confusion or conflict among the state high courts, there is no need for this Court to grant certiorari here. The decision below faithfully applied relevant precedent, and Petitioners, at best, merely ask the Court to examine whether the Ohio Supreme Court correctly applied settled law. Petitioners may quarrel with how the Ohio Supreme Court applied the law to the facts of the case, but that is not the sort of "error" worthy of a grant of certiorari. Sup. Ct. Rule 10. There is no reason why this Court should review a ruling that in no way conflicts with the decisions of this Court or other courts of appeals.

Quite apart from Petitioners' failure to satisfy the criteria of Sup. Ct. Rule 10, review is also unwarranted because this case is an exceptionally poor vehicle to resolve any question presented. The Ohio Supreme Court's decision appropriately and correctly construes the law in Ohio. Its application outside Ohio, should other states enact asbestos-reform legislation in the future, is speculative at best.

CONCLUSION

Petitioner has not established any compelling reason for this Court to grant the Petition. Wherefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

TIMOTHY J. FITZGERALD*
KEVIN C. ALEXANDERSEN
COLLEEN A. MOUNTCASTLE
HOLLY OLARCZUK-SMITH
GALLAGHER SHARP
Bulkley Building
Sixth Floor
1501 Euclid Avenue
Cleveland, OH 44115-2108
(216) 241-5310

Counsel for Respondent

* Counsel of Record

May 12, 2008

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No. 07-1152

IN THE
Supreme Court of the United States

CHARLES ODELL WELDON AND
ERIC A. WILES, INDIVIDUALLY AND IN HIS CAPACITY AS EXECUTOR OF THE ESTATE OF LARRY ARNOLD WILES,
Petitioners,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

REPLY BRIEF FOR PETITIONERS

CHRISTOPHER J. HICKEY
MARY BRIGID SWEENEY
BRENT COON AND ASSOCIATES
1220 West Sixth Street
Suite 303
Cleveland, Ohio 44113
(216) 241-1872

DAVID C. FREDERICK
Counsel of Record
KELLY P. DUNBAR
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Petitioners

May 27, 2008

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CONSTITUTION, STATUTES, AND RULES

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This case involves a direct encroachment by a state legislature on Congress's statutory policy judgments, as long upheld by this Court. It implicates a specific conflict between Ohio and Georgia on whether states' asbestos reform efforts work substantive changes to the rights of plaintiffs and also broader judicial conflicts over the standards to apply in judging FELA preemption of state-law requirements. The decision below divests rail workers in one of the nation's largest states from federal remedies long recognized by this Court. Certiorari therefore is warranted.

I. ALL ISSUES RAISED IN THE PETITION ARE PROPERLY BEFORE THIS COURT

Respondent's opening argument erroneously maintains (at 7-13) that petitioners failed to raise the specific argument that H.B. 292 is preempted because it is inconsistent with FELA causation standards.

Respondent initiated this action, seeking a declaration that application of H.B. 292 to FELA claims is consistent with the Supremacy Clause. *See* Opp. 6. Petitioners have consistently argued that Ohio cannot burden the exercise of rights under the FELA through threshold evidentiary requirements and cited this Court's decision in *Rogers v. Missouri Pacific Railroad*, 352 U.S. 500 (1957), before the appellate court, as respondent admits (at 8-9). Petitioners argued that H.B. 292's causation standard is inconsistent with *Rogers*, which adopted a relaxed FELA causation standard. Appellant's Br. 8; *see id.* at 12 (quoting decision that construed *Rogers* as articulating standard that a carrier is liable when "'negligence . . . played any part, however small, in the injury or death'"). In opposing petitioners' motion to reconsider the Ohio Supreme Court's decision, moreover, respondent argued that reconsideration

was not necessary despite the Ohio Supreme Court's refusal to accept petitioners' merits brief because petitioners "briefed their position at length before the Eighth District Court of Appeals" and therefore "their position on the issues involved in this appeal are contained in the record." Opp. to Mot. for Recon. 2 (Oct. 25, 2007). Based on that representation and the fact that petitioners preserved this causation argument before the state court of appeals, respondent cannot now be heard to argue that petitioners did not sufficiently raise an argument based on *Rogers*.[1]

In any event, the Ohio court unquestionably passed on whether H.B. 292's threshold evidentiary rules may be constitutionally applied to FELA claims: "[t]he central issue presented for our consideration concerns whether the application of the prima facie filing requirements of [H.B. 292], as codified in R.C. 2307.92, to asbestos claims arising out of the [FELA] . . . infringes upon the Supremacy Clause." Pet. App. 1a. Section 2307.92 includes the substantial-contributing-factor causation standard. *See id.* at 51a. Indeed, the court below quoted the provision of H.B. 292 that requires a plaintiff to submit evidence establishing that "exposure to asbestos is a substantial contributing factor to the medical condition." *Id.* at 3a. Accordingly, respondent's position that the court below did not resolve whether H.B. 292's causation standard may be constitutionally applied to FELA claims has no merit.

Because the court below "passed upon" the broad issue of the constitutionality of H.B. 292's application

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[1] Petitioners further cited *Rogers* and the Georgia Supreme Court's decision (discussed below) regarding the substantial-contributing-factor standard in their motion for reconsideration. *See* Mot. for Recon. (Oct. 18, 2007).

to FELA claims as well as the subsidiary issue of whether the substantial-contributing-factor standard may be applied to FELA claims, it is well settled that this Court "permits review of [the] issue." *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (internal quotation marks and alteration omitted); *see United States v. Williams*, 504 U.S. 36, 40-45 (1992).[2] To be sure, the Ohio Supreme Court did not discuss *Rogers*, but that only underscores the substantial error in the court's analysis: the court undertook no meaningful consideration of the burdens that H.B. 292's threshold evidentiary rules — including the heightened causation standard — impose on FELA claimants. *See* Pet. 12-21.

Respondent's reliance (at 8) on Supreme Court Rule 14(g)(i) is no more availing. That rule facilitates the identification of a federal question in a state proceeding, and the constitutionality of H.B. 292's application to FELA claims unquestionably raises a federal question. The petition, moreover, sets forth how that question was raised below: respondent sought a declaration on preemption, *see* Pet. 9-11, and the Ohio court decided that federal question, as even respondent's statement of the question presented acknowledges.[3]

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[2] Even had petitioners not cited *Rogers*, petitioners' argument now is a "new argument to support what has been [a] consistent claim" that the Supremacy Clause bars application of H.B. 292 to FELA claims. *Lebron*, 513 U.S. at 379.

[3] The absence of a merits brief before the court below has no bearing on the propriety of this Court's review. The issue of whether a state statute purporting to govern federal claims is preempted implicates substantial public interests. To immunize the decision from review based on a private default would be inconsistent with this Court's duty to ensure the correct and uniform interpretation of the FELA. Nor does the absence of a

II. H.B. 292 CANNOT CONSTITUTIONALLY BE APPLIED TO FELA CLAIMS

A. The petition establishes that the decision below cannot be reconciled with this Court's FELA precedent (as well as the FELA precedent of state high courts). *First*, the Ohio Supreme Court erred in classifying H.B. 292's evidentiary rules as procedural. H.B. 292's rules "condition[] the right of recovery that Congress has authorized [under the FELA], and do[] so for a reason manifestly inconsistent with the purposes of the federal statute: to minimize . . . liability," *Felder v. Casey*, 487 U.S. 131, 141 (1988), and the rules impose a passel of threshold standards, burdens of proof, and evidentiary rules that are substantive, not procedural, in nature, *see* Pet. 12-17. *Second*, even if H.B. 292's rules could be deemed procedural, the Ohio court's decision conflicts with decisions of this Court — including *Brown v. Western Railway of Alabama*, 338 U.S. 294 (1949) — holding that state rules of procedure may not undermine substantive rights afforded by and interests protected by the FELA. *See* Pet. 18-21. The petition shows that application of H.B. 292 to FELA claims substantially undermines the remedial purposes of the FELA and Congress's interest in uniform application of the statute.

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merits brief by petitioners affect this case's status as a vehicle for review in light of respondent's concession below that the Ohio court "gave due consideration to the arguments presented by Norfolk and the position taken by [petitioners] which was adopted by the Eighth Appellate District. [The court] understood the issues raised in the case, appreciated the impact its decision would have on FELA asbestos claimants in Ohio and rendered a well-reasoned opinion supported by precedent from [this Court.]" Opp. to Mot. for Recon. 10.

B. Respondent's defense of the decision below is unconvincing. *First*, respondent incorrectly contends (at 1) that H.B. 292 does not conflict with federal law because the court "construed the statute to require no more than a preliminary evidentiary showing that the plaintiff has a good-faith basis for the claims asserted." H.B. 292 actually imposes a series of detailed evidentiary requirements. *See* Pet. 6-8. The court below held that application of each of those requirements to FELA claims is constitutional. The "good-faith basis" language quoted by respondent is the court's characterization of H.B. 292's requirements, not an interpretation of the substance of what H.B. 292 requires.

Accordingly, there is no cause to defer reviewing H.B. 292's application to FELA claims until there is further judicial exegesis of H.B. 292. *See* Opp. 10. Respondent points to no ambiguity in H.B. 292's threshold evidentiary rules, and there is none. H.B. 292, for example, defines "substantial contributing factor" with specificity. *See* Ohio Rev. Code Ann. § 2307.91(FF). As defined, that standard exceeds any formulation of the FELA's causation standard, as exposure to asbestos must be a "predominate cause" of injury and supported by a "reasonable degree of medical certainty." *Id.*; *see* Pet. 15 n.6; *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994) (FELA's "relaxed standard of causation" reflects "Congress' remedial goal"). Respondent's position that FELA claimants in Ohio should wait until a court announces that the text of H.B. 292 means what it says is an illogical prerequisite to this Court's plenary review. *See* Opp. 9 (criticizing petitioners for "[a]rguing only from the text of the state statute").

Second, respondent argues (at 10) that H.B. 292 governs medical, not legal, causation and is thus not preempted. Not so. A plaintiff carries a burden of showing the defendant caused the injury suffered. In the asbestos context, that means showing that the disease suffered is caused by asbestos exposure that, in turn, is caused by the defendant. "Medical causation" is thus part and parcel of "legal causation." The upshot of H.B. 292 is to take one key link in the overall chain of causation and subject that link to a stricter causation standard than would govern under federal law. That outcome cannot be squared with either the broad remedial purposes of the FELA or Congress's desire for uniformity.

Third, respondent relies (at 3-4) on H.B. 292's aim of managing asbestos litigation. That reliance is misplaced. As this Court said in *Norfolk & Western Railway v. Ayers*, 538 U.S. 135 (2003), "[c]ourts . . . must resist pleas . . . to reconfigure established liability rules because they do not serve to abate today's asbestos litigation crisis." *Id.* at 166. In our federal system, state legislatures may not frustrate the ends of federal law to achieve asbestos reform. The decision to afford broad recovery to FELA claimants "was a choice that Congress . . . made, and it is a decision that the State has no authority to override"; regardless of how "understandable or laudable the State's interest in controlling liability expenses might otherwise be, it is patently incompatible with the compensatory goals of the federal legislation." *Felder*, 487 U.S. at 143.[4]

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[4] Respondent's attempt (at 16-17) to recast the purposes of H.B. 292 is similarly unavailing. H.B. 292 implements the Ohio legislature's views regarding the inefficiency of state and federal asbestos litigation, and the legislature's aim of reducing

Fourth, respondent argues (at 19) that H.B. 292 can be squared with numerous FELA decisions of this Court simply because the Ohio court described H.B. 292 as a "procedural prioritization" and "[n]othing more." This argument is wide of the mark because a state's label is irrelevant to preemption analysis. *See Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330, 333-35 (1988); Pet. 12 n.4. Petitioners have established that H.B. 292's threshold evidentiary rules substantively regulate FELA claims in a manner inconsistent with multiple decisions of this Court. *See supra* p. 4.[5]

Similarly, and contrary to respondent's claim (at 19-20), it is irrelevant that H.B. 292 does not affect the liability phase of trial. As this Court held in *Felder*, "although a party bringing suit against a local governmental unit need not allege compliance with the notice statute" — and thus the statute did not affect the elements of a cause of action — "the statute confers on . . . defendants an affirmative defense that obligates the plaintiff to demonstrate compliance with the notice requirement before he or she may recover at all." 487 U.S. at 144. H.B. 292 here gives defendants a right to seek the dismissal of

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aggregate liability. *See* Pet. 6. Congress has made a different choice with respect to railroad workers. *See, e.g., Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958) ("it is clear that the general congressional intent . . . was to provide liberal recovery for injured workers"). "State courts," this Court has emphasized, "are not free to vindicate the substantive interests underlying a state rule of decision at the expense of the federal right." *Felder*, 487 U.S. at 152.

[5] H.B. 292 is not, as respondent suggests, a prioritizing scheme: FELA claimants that cannot satisfy H.B. 292 can never have their claims adjudicated in state court, whereas prior to H.B. 292 they could.

FELA claims based on a plaintiff's inability to satisfy threshold evidentiary requirements. It should be evident from FELA precedent that Ohio may not, consistent with the Supremacy Clause, alter the elements of a FELA cause of action at trial; and it follows that Ohio is not free to accomplish indirectly, by imposing evidentiary rules as a condition precedent to pursuing FELA claims, what it cannot do directly.[6]

Fifth, the MDL case management order does not save H.B. 292 from preemption, as respondent argues (at 23-26). Unlike H.B. 292, the case management order does not: define the quantum of evidence required for reinstatement; impose causation and evidentiary requirements stricter than those imposed under substantive law; define with specificity the qualifications of the medical professional that must provide a diagnosis; impose burdens of proof inconsistent with substantive law; or purport to regulate at all the contents of the affidavit. *See* Pet. 24-25. Respondent's only response (at 26) to these crucial differences, each of which is firmly grounded in the text of H.B. 292, is to repeat the claim that the Ohio court interpreted H.B. 292 as not imposing "additional substantive requirements." But that judicial label is irrelevant: H.B. 292 in purpose and effect operates to impose substantive conditions on the exercise of FELA claims, conditions that are not

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[6] *Johnson v. Fankell*, 520 U.S. 911 (1997), does not affect this analysis. The Court there held that state procedural rules were not preempted because there was no substantial federal interest involved: application of the state "procedural rules," this Court said, "is . . . less an interference with *federal* interests than a judgment about how best to balance . . . competing state interests." *Id.* at 919-20. Here, as explained, substantial federal interests are at stake.

applicable under the case management order. *See* Pet. 12-21.

III. REVIEW BY THIS COURT IS NEEDED

The decision below deepens confusion in federal and state courts over FELA preemption, directly conflicts with a decision of Georgia's highest court, and raises important issues that are likely to recur and further divide state and federal courts. *See* Pet. 26-33. The petition also establishes that the decision below creates an immediate disuniformity in state court applications of the FELA that only this Court can correct. *See id.* Each of those justifications warrants this Court's review.

Respondent's contrary arguments are unpersuasive. *First*, respondent's effort to downplay the conflict between the Ohio court's decision and *Daimler Chrysler Corp. v. Ferrante*, 637 S.E.2d 659 (Ga. 2006), is unconvincing. In direct conflict with the decision below, the Georgia court held that a state statute similar to H.B. 292 impaired substantive rights by adopting a heightened causation standard for asbestos claims. *See id.* at 661-62. Crucially, it was irrelevant to the court's analysis that dismissed claims were "not preserved for the purposes of the applicable statute of limitations," as respondent argues here (at 27) — the Georgia court did not even cite that facet of the statute. The crucial distinction — as now determined by those two state courts interpreting virtually identical statutes — is that, in Ohio, threshold evidentiary rules like those imposed by H.B. 292 are *not* substantive restrictions on FELA plaintiffs' rights, whereas in Georgia they are. This Court should grant review to resolve this divide between state high courts.

Second, respondent seeks to sidestep (at 28) the conflicting decisions reached by state courts on FELA preemption on the ground that there is no conflict on "the same federal question." In the FELA context, however, this Court has been resolute to review decisions of state courts that conflict with federal law, without even hinting at "the same federal question" standard. *See, e.g., Dice v. Akron, C. & Y.R.R.*, 342 U.S. 359, 361 (1952). Even outside of the FELA context, this Court has granted certiorari in cases involving laws that burden federal interests absent express conflicts. *See, e.g., Rice v. Cayetano*, 528 U.S. 495, 498-511 (2000); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 389-90 (1994); *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 339 (1992). The federal interests at issue here compel the same result.

In any event, respondent misapprehends the appropriate level of generality in arguing that there is no conflict on "the same federal question." The petition shows that multiple state high courts, contrary to the Ohio court, have held that FELA standards of proof, burdens of proof, and quanta of proof are governed by federal, not state, law. *See Haselden v. Atlantic Coast Line R.R.*, 53 S.E.2d 60, 63 (S.C. 1949); *Montgomery v. CSX Transp., Inc.*, 656 S.E.2d 20, 28 (S.C. 2008); *Union Pac. R.R. v. Williams*, 85 S.W.3d 162, 170 (Tex. 2002); *McMillan v. National R.R. Passenger Corp.*, 648 A.2d 428, 431 (D.C. 1994); *Adair v. Northern Pac. Ry.*, 392 P.2d 830, 831 (Wash. 1964); Pet. 26-29. To be sure, those courts were not construing H.B. 292, but analyzing conflict claims at that level of generality is absurd: it would effectively immunize from this Court's review decisions upholding the constitutionality of state laws that burden

federal interests, and it ignores the obvious conflict between Ohio and other states on whether federal or state law governs these aspects of FELA claims.

In sum, the decision below substantially conflicts with a decision of the Georgia Supreme Court, is in conflict with multiple other state high courts (as well as decisions of this Court), and deepens confusion in state and federal courts regarding FELA preemption. Beyond those considerations, respondent does not deny that the key issue in this case — whether states may burden the exercise of federal rights in an effort to manage asbestos litigation — is certain to recur in view of accelerating state asbestos reform (modeled on H.B. 292). *See* Pet. 31. This Court should grant certiorari now to provide needed guidance and to make clear that, however states may wish to regulate state-law claims, the Supremacy Clause precludes states from impeding the exercise of federal rights in pursuing those litigation reform efforts.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHRISTOPHER J. HICKEY
MARY BRIGID SWEENEY
BRENT COON AND
ASSOCIATES
1220 West Sixth Street
Suite 303
Cleveland, Ohio 44113
(216) 241-1872

DAVID C. FREDERICK
Counsel of Record
KELLY P. DUNBAR
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Petitioners

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In the Supreme Court of the United States

CHARLES ODELL WELDON, ET AL.,
PETITIONERS

v.

NORFOLK SOUTHERN RAILWAY COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

GREGORY G. GARRE
Solicitor General
Counsel of Record
GREGORY G. KATSAS
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
LISA H. SCHERTLER
Assistant to the Solicitor General
THOMAS M. BONDY
ANNE MURPHY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

An Ohio statute requires plaintiffs seeking tort damages for some forms of asbestos-related injury to make a complaint-stage prima facie showing that they have an asbestos-related physical impairment. The question presented is whether the Supremacy Clause permits the Ohio statute to be applied to plaintiffs whose causes of action arise under the Federal Employers' Liability Act.

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In the Supreme Court of the United States

No. 07-1152

CHARLES ODELL WELDON, ET AL.,
PETITIONERS

v.

NORFOLK SOUTHERN RAILWAY COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. This Court has recognized that asbestos litigation "defies customary judicial administration." *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 821 (1999). The challenges of asbestos litigation arise from, *inter alia*, the variable nature and long latency period of asbestos-related disease, the large population of potential claimants, and the finite and depleting resources of defendants. Asbestos exposure can cause asymptomatic physiological changes (such as thickening of the pleural tissue outside the lungs), non-malignant pulmonary disease (such as asbestosis) that may or may not cause symp-

toms, or mesothelioma, a cancer that causes "agonizing, unremitting pain in the lungs" and "almost certain" death within a short period of time. *Norfolk & W. Ry.* v. *Ayers*, 538 U.S. 135, 168 (2003) (Kennedy, J., concurring in part and dissenting in part); see Commission on Asbestos Litig., ABA, *Report to the House of Delegates* 6-7 (2003) (*ABA Report*);[1] Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv. J.L. & Pub. Policy 541, 544 (1992) (*Worst Should Go First*). The latency period for asbestos-related disease spans one or more decades, and for some exposed individuals, symptoms will never develop. *ABA Report* 6, 12.

Bankruptcies among asbestos defendants limit the funds available to compensate victims. *Ayers*, 538 U.S. at 169 (Kennedy, J., concurring in part and dissenting in part) (noting that 57 companies have been driven to bankruptcy by asbestos litigation). Statute-of-limitations concerns encourage the filing of claims by plaintiffs who have been exposed to asbestos but as yet suffer no asbestos-related disease. *ABA Report* 9-11. In addition, for-profit litigation screening companies that "actively solicit asymptomatic workers," as well as lax or fraudulent pre-litigation medical examinations, have exacerbated the trends. *Id.* at 8-9.

2. a. In 2004, the Ohio General Assembly enacted a measure to address the "extraordinary volume of nonmalignant asbestos cases [that] continue to strain federal and state courts." Act of June 3, 2004 (H. 292), Am. Sub. H. Bill No. 292, § 3(A)(3), 2003-2004 Ohio Laws 3989. The statute requires certain state-court asbestos

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[1] The ABA Report is available at http://www.abanet.org/leadership/full_report.pdf.

plaintiffs to file documentation with their complaint—in the form of a written report and medical-test results—establishing prima facie evidence that the plaintiff has a physical impairment for which asbestos exposure was "a substantial contributing factor." Ohio Rev. Code Ann. § 2307.92 (LexisNexis 2005). The filing requirement applies to asbestos-related claims that are based on a nonmalignant condition (*i.e.*, a condition other than a diagnosed cancer), asbestos-related lung cancer claims brought by plaintiffs who also were smokers, and asbestos-related wrongful death claims. *Id.* § 2307.92(B), (C) and (D). The filing requirement does not apply to claims based on mesothelioma, a disease for which asbestos is the only known cause. *Id.* § 2307.92(E); see *Ayers*, 538 U.S. at 142 n.4.

A plaintiff alleging a non-malignant condition must establish that a "competent medical authority"—defined as a board-certified specialist who has treated and had a doctor-patient relationship with the plaintiff and spends no more than 25% of his or her time providing consulting or expert services in tort actions—has diagnosed the plaintiff as having an asbestos-related physical impairment. Ohio Rev. Code Ann. §§ 2307.91(Z), 2307.92(B) (LexisNexis 2005). The diagnosis must have taken account of the patient's personal and medical history, including all possible sources of asbestos exposure, and be based on a medical examination and pulmonary function testing. *Id.* § 2307.92(B). The statute specifies the minimum findings (with respect to respiratory impairment, lung capacity, and chest x-ray results) that will substantiate a diagnosis that the patient has an asbestos-related physical impairment. *Ibid.* For smokers with lung cancer, similar requirements apply, including a diagnosis by a competent medical authority that

the patient experienced substantial asbestos exposure, evidence of a minimum latency period of ten years between the patient's first exposure to asbestos and the diagnosis of lung cancer, and a finding by the specialist that exposure to asbestos was a "substantial contributing factor" to the cancer. *Id.* § 2307.92(C)(1). Plaintiffs in wrongful death actions must make a similar submission. *Id.* § 2307.92(D)(1).

The purpose of the medical screening provisions of the Ohio statute is to prioritize asbestos-related tort claims on the state court docket. H. 292 § 3(B)(1), 2003-2004 Ohio Laws 3991. Cases in which the prima facie showing is satisfied proceed to discovery and adjudication, and cases in which the showing is not made are "administratively dismiss[ed] * * * without prejudice." Ohio Rev. Code Ann. § 2307.93(C) (LexisNexis 2005). The trial court "maintain[s] its jurisdiction" over the administratively dismissed case, the statute of limitations is tolled, and the plaintiff may move to reinstate the case at any time by presenting prima facie evidence that satisfies the statute. *Id.* §§ 2307.93(C), 2307.94(A).

b. In its statement of findings and intent, the Ohio legislature indicated that "reasonable medical criteria" were "a necessary response to the asbestos litigation crisis in this state." H. 292 § 3(A)(5), 2003-2004 Ohio Laws 3991. The legislature noted that "the vast majority of Ohio asbestos claims are filed by individuals who allege they have been exposed to asbestos and who have some physical sign of exposure to asbestos, but who do not suffer from an asbestos-related impairment." *Id.*

§ 3(A)(5), 2003-2004 Ohio Laws 3990.[2] The legislature found that reasonable medical criteria applied to claims at the outset of litigation would permit the state courts to "expedite the resolution of claims brought by * * * sick claimants and [would] ensure that resources are available for those who are currently suffering from asbestos-related illnesses and for those who may become sick in the future." *Ibid.*

3. a. Petitioners Charles Odell Weldon and Eric A. Wiles are former employees of Norfolk Southern Railway Company (Norfolk) who filed suits against Norfolk in Ohio state court under the Federal Employers' Liability Act (Railroads) (FELA), 45 U.S.C. 51 *et seq.* Pet. App. 17a-18a.[3] Petitioners claimed that Norfolk negligently exposed them to asbestos during the course of their employment and that they consequentially contracted "'occupational pneumoconiosis including but not limited to asbestosis, silicosis, and[/]or coal workers lung disease and/or lung cancer.'" Pet. 8 (quoting Compl. para. 14). Petitioners also sought damages for their fear of contracting cancer in the future. *Ibid.* (citing Compl. para. 15). Petitioners filed their complaints in 1999, before the Ohio statute was enacted, and, following its enactment, did not file the required report and medical

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[2] The legislature cited a study that found that 94% of the 52,900 asbestos claims filed in Ohio state court in 2000 "concerned claimants who are not sick." H. 292 § 3(A)(5), 2003-2004 Ohio Laws 3990.

[3] Petitioner Wiles also sued in his capacity as executor of the Estate of Larry Arnold Wiles. The FELA provides that "[e]very common carrier by railroad while engaging in [interstate] commerce * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury or death resulting in whole or in part from the negligence" of the carrier or its agents. 45 U.S.C. 51.

test results by the statutory deadline. Pet. App. 17a, 36a-37a.

In response, Norfolk filed a separate action for a declaratory judgment in the Cuyahoga County Court of Common Pleas seeking a determination that the Ohio statute applied to petitioners' pending FELA cases and that the statute "did not infringe on the Supremacy Clause of the United States Constitution." Pet. App. 18a. The Court of Common Pleas held that the FELA preempted the Ohio statute. *Id.* at 32a, 34a-39a. The Court of Appeals of Ohio affirmed, *id.* at 17a-31a, finding that application of the Ohio statute to FELA cases "might preclude claimants from vindicating a substantive right to bring a claim" under the FELA, *id.* at 30a-31a.

b. The Ohio Supreme Court reversed. Pet. App. 1a-16a. The court first determined that the Ohio statutory scheme is "procedural in nature" because it "create[s] a procedure to prioritize the administration and resolution" of existing causes of action and does not "make it more difficult for a claimant to succeed on the merits of a claim." *Id.* at 7a-8a. The court also held that the statutory requirements were not preempted as "procedural provisions [that] impose an unnecessary burden on FELA claimants." *Id.* at 8a-9a. The court relied on *Minneapolis & St. Louis Railroad* v. *Bombolis*, 241 U.S. 211 (1916), *Missouri ex. rel. Southern Railway Co.* v. *Mayfield*, 340 U.S. 1 (1950), *Johnson* v. *Fankell*, 520 U.S. 911 (1997), and *American Dredging Co.* v. *Miller*, 510 U.S. 443 (1994), decisions in which this Court upheld the application of state procedural rules in cases brought under the FELA or another federal statute. Pet. App. 9a-12a. The court concluded that the Ohio statute was a "neutral" rule that "simply permits the

court to prioritize claims for trial purposes" and imposes no greater burden on plaintiffs than the pleading standard contained in Rule 11 of the Ohio Rules of Civil Procedure. *Id.* at 12a (quoting *Johnson*, 520 U.S. at 918).

The Ohio Supreme Court noted that its finding of no preemption was "fortified by the fact that the federal courts themselves have responded to the growth of asbestos litigation by initiating a similar method to prioritize asbestos-related cases." Pet. App. 14a. The court explained that, like the Ohio statute, multi-district litigation (MDL) procedural rules in federal court require asbestos tort plaintiffs to file with their complaint a "doctor-patient medical report setting forth an asbestos-related disease." *Ibid.* (quoting *In re Asbestos Prods. Liab. Litig.*, No. MDL 875, 2002 WL 32151574, at *1 (E.D. Pa. Jan. 16, 2002)). As in Ohio state court, non-compliant federal MDL complaints are administratively dismissed without prejudice, but the statute of limitations is tolled and the plaintiff may move to reinstate the case by filing the required information. *Ibid.* The court noted that the Ohio statutory provisions were "more specific than" the federal MDL order, but that "the effect and purpose [of the two procedures were] generally the same." *Id.* at 15a.[4]

DISCUSSION

This case involves only the threshold requirements under the Ohio statute concerning the claimant's medical condition, not other provisions such as those addressing the types of damages that ultimately may be recovered or the legal liability of particular employers.

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[4] Two judges dissented and found that the Ohio statute would infringe on the plaintiffs' "substantive rights to assert a cause of action under federal law in a state court." Pet. App. 16a (quoting *id.* at 29a).

See note 7, *infra*. Petitioners principally contend that the Court's intervention is warranted because the Ohio Supreme Court "upheld statutory rules that impose *stricter* threshold medical evidentiary requirements than asbestos plaintiffs would need to satisfy as a matter of substantive law to have a claim submitted to a jury or to recover under the FELA if litigated in federal court." Pet. 1. We agree with respondent (Br. in Opp. 7-10) that petitioners' contention is, at this time at least, an unproven hypothesis. The Ohio Supreme Court made no determination that the state law medical criteria would exceed the substantive standards for liability under the FELA. Petitioners' contention that the Ohio statute has the effect of raising the substantive standard for FELA liability thus finds no support in the Ohio Supreme Court's opinion, nor can it be assessed independently by this Court on the limited record in this declaratory judgment action, which does not include any evidence of petitioners' conditions. For those reasons, further review of petitioners' claim is unwarranted. This case, moreover, arises in an abstract posture, with essentially only the validity of the Ohio statute on its face before the Court. That posture would make it difficult for the Court to resolve questions concerning possible preemption issues that might arise in the interpretation of the Ohio statute and its application to particular claims or types of claims. Petitioners' further argument (Pet. 26-27) that the Court's intervention is required to resolve more general "confusion in state courts regarding FELA preemption" (Pet. 26) is without merit.

I. THE OHIO SUPREME COURT'S PREEMPTION RULING DOES NOT WARRANT THE COURT'S REVIEW

1. a. A cause of action under the FELA may be litigated either in federal or state court. *Second Employers' Liab. Cases*, 223 U.S. 1, 55-56 (1912); 45 U.S.C. 56. "As a general matter, FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal." *St. Louis Sw. Ry.* v. *Dickerson*, 470 U.S. 409, 411 (1985) (per curiam).[5] Even a state procedural rule may be preempted where it conflicts with, or undermines, a principle of federal law. See, *e.g.*, *Brown* v. *Western Ry.*, 338 U.S. 294, 296 (1949) (State "rules of practice and procedure" may not "dig into 'substantive rights.'").

b. This Court explained the fundamentals of preemption in the context of the FELA in *Dice* v. *Akron, Canton & Youngstown Railroad*, 342 U.S. 359 (1952). In *Dice*, the Court held that the validity of a release of FELA liability signed by a railroad fireman was governed by federal law. This Court noted that in the FELA, Congress granted railroad employees "a right to recover against [their] employer for damages negligently inflicted" and that state laws could not be "controlling in determining what the incidents of this federal right shall be," including "what defenses could and could not be properly interposed to suits under the Act." *Id.* at 361. *Dice* also emphasized that "only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes." *Ibid.*; see *Brown*, 338 U.S. at 299 (holding

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[5] This Court, however, long ago acknowledged "the impossibility of laying down a precise rule to distinguish 'substance' from 'procedure'" in this context. *Brown* v. *Western Ry.*, 338 U.S. 294, 296 (1949).

that Georgia state court's restrictive construction of a FELA complaint was not binding on review because, *inter alia*, "over-exacting local requirements for meticulous pleadings" would prevent achievement of a "desirable uniformity in adjudication of federally created rights").

In two non-FELA cases, this Court has more recently addressed the circumstances in which state procedures must yield when a federal cause of action is brought in state court. *Felder* v. *Casey*, 487 U.S. 131 (1988), involved a civil-rights action brought against Milwaukee police officers under 42 U.S.C. 1983 in state court. A Wisconsin statute required a plaintiff suing a state or local officer to notify the government of the substance and amount of the contemplated claim within 120 days of the alleged injury and permit the government the opportunity to settle the claim before it was filed. *Felder*, 487 U.S. at 136-137. The Court concluded that the notice-of-claim statute "conflict[ed] in both its purpose and effects with the remedial objectives of § 1983," and therefore was preempted. *Id.* at 138. The purpose of the state statute was to "minimize governmental liability," a goal that was "manifestly inconsistent with the purpose[] of the federal statute," *i.e.*, to "provide compensatory relief to those deprived of their federal rights by state actors." *Id.* at 141. The Court also found that the Wisconsin statute would "frequently and predictably produce different outcomes in federal civil rights litigation based solely on whether that litigation takes place in state or federal court." *Ibid.* In addition, the Court found "no reason to suppose that Congress * * * contemplated that those who sought to vindicate their federal rights in state courts could be required to seek redress in the first instance from the very state officials

whose hostility to those rights precipitated their injuries." *Id.* at 147.

Johnson v. *Fankell*, 520 U.S. 911 (1997), also involved an action brought in state court under 42 U.S.C. 1983. Distinguishing *Felder*, the Court held that the Supremacy Clause did not require preemption of an Idaho rule that barred interlocutory appeal of the trial court's denial of a motion to dismiss the complaint on qualified immunity grounds. *Johnson*, 520 U.S. at 913. Even though interlocutory appeal would be available in federal court, the "normal presumption against preemption [was] buttressed by" the fact that Idaho's interlocutory-appeal rule was a "neutral state Rule regarding the administration of the state courts." *Id.* at 918. And, unlike the notice-of-claim statute in *Felder* that required dismissal of the underlying action for noncompliance with its provisions, application of the Idaho rule was not "outcome determinative," *i.e.*, it would not affect "the ultimate disposition of the case" to the detriment of federal interests because the defendants' qualified immunity arguments could be addressed on appeal from a final judgment. *Id.* at 920-921.

2. Under the foregoing principles, petitioners have not demonstrated that the Supremacy Clause necessarily precludes application of Ohio's general medical screening provisions for asbestos claims to causes of action under the FELA. There is no inherent inconsistency between those provisions and the FELA, and petitioners' argument that the provisions impose evidentiary standards that exceed substantive liability standards under the FELA is not established on the present record.

a. In *Metro-North Commuter Railroad* v. *Buckley*, 521 U.S. 424, 427 (1997), this Court held that a railroad

worker who alleges that he was negligently exposed to asbestos cannot recover damages under the FELA "unless, and until, he manifests symptoms of a disease." Applying the "physical impact" standard for FELA "injury" announced in *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532 (1994), the Court explained that "the words 'physical impact' * * * do not include a contact that amounts to no more than an exposure * * * to a substance that poses some future risk of disease." *Buckley*, 521 U.S. at 429-432. The Court recognized that compensating those who feared asbestos-related illness, but who might never become sick, could divert resources from plaintiffs who had developed or would develop symptomatic asbestos-related disease: "In a world of limited resources," the Court asked, "would a rule permitting immediate large-scale recoveries for widespread emotional distress caused by fear of future disease diminish the likelihood of recovery by those who later suffer from the disease?" *Id.* at 435-436 (citing, *inter alia*, *Worst Should Go First*, *supra*).

In *Norfolk & Western Railway* v. *Ayers*, 538 U.S. 135 (2003), the Court reaffirmed that asbestos-related "injury" cognizable under the FELA must rise to the level of an asbestos-related disease. The *Ayers* plaintiffs suffered from asbestosis. *Id.* at 140. Noting that, "of those exposed to asbestos, only a fraction will develop asbestosis," *id.* at 157 (citation omitted), the Court held that the plaintiffs' asbestos-related disease also allowed them to recover "parasitic" damages under the FELA for the emotional distress attributable to the fear of developing another disease—cancer—in the future, *id.* at 148. The Court reasoned that asbestosis, a "chronic, painful and concrete reminder" of the plaintiffs' injurious asbestos exposure, was a "bodily harm" that made the asbestos

defendants liable under the FELA for related pain-and-suffering damages, including compensation for a heightened risk of contracting cancer. *Id.* at 155 (quoting *Eagle Picher Indus., Inc.* v. *Cox*, 481 So. 2d 517, 529 (Fla. Dist. Ct. App. 1986)); *id.* at 154 (quoting Restatement (Second) of Torts, § 456, at 494 (1965)). The Court also reiterated, however, that the FELA provides no right to relief for disease-free "asymptomatic plaintiffs," including those who experience asbestos-related physiological changes (such as pleural plaque or pleural thickening) that do not constitute asbestos-related disease. *Id.* at 156 (citing James A. Henderson, Jr., & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. Rev. 815, 830 (2002)).

b. Symptomatic asbestos-related disease thus is an essential element of a cause of action under the FELA, which the plaintiff must establish by the common law preponderance of the evidence standard. See *Norfolk S. Ry.* v. *Sorrell*, 549 U.S. 158, 165-166 (2007) ("Absent express language to the contrary, the elements of a FELA claim are determined by reference to the common law."). There is no inherent inconsistency between the FELA and the provisions of the Ohio statute at issue here, because the Ohio statute serves to identify—and expedite—those cases in which the plaintiff has obtained the basic medical evidence required to establish asbestos-related injury, a prerequisite to asbestos-related FELA liability. The evidentiary submissions that petitioners claim are unfairly required of them (Pet. 7) merely reflect the fact that, unlike some "injuries" that are observable and easily diagnosed, the standard medi-

cal protocol for identifying asbestos-related disease is more complex.

"[T]he diagnosis of asbestos-related pleural disease, and particularly asbestosis, requires assessment of a number of factors including the review of chest x-rays, pulmonary function tests, latency, and the taking of a complete occupational, exposure, medical and smoking history." *ABA Report* 12. These tests and patient histories are necessary "to enable a physician to exclude other more probable causes," because "many symptoms and findings are not specific to asbestos-related disease" and may result from smoking or other non-asbestos-related environmental factors. *Ibid.* The diagnostic tests specified in the Ohio statute are standard measures for distinguishing asbestos-related diseases from other ailments. For instance, pulmonary function tests, see Ohio Rev. Code Ann. § 2307.92(B)(3)(a) and (b) (LexisNexis 2005), distinguish "*restrictive* lung disease, which can be caused by asbestos, from *obstructive* lung disease, which is normally associated with smoking and is not associated with asbestos exposure." *ABA Report* 15. In addition, a positive chest x-ray reading by a certified reader, see Ohio Rev. Code Ann. § 2307.92(B)(3)(b)(i)(III) and (ii) (LexisNexis 2005), "is almost always viewed as a necessary component of the diagnosis of asbestosis." *ABA Report* 13.

The Ohio statute also appears to set low minimum requirements for showing physical impairment, which reinforces the conclusion that the statute seeks to defer adjudication of only those claims that were brought prematurely—*i.e.*, before asbestos-related injury is evident. For example, lung irregularities revealed by x-ray that are graded at a borderline 1/0 on the "ILO scale" can satisfy Ohio's prima facie standard. Ohio Rev. Code

Ann. § 2307.92(B)(3)(b)(ii) (LexisNexis 2005).[6] And the statute specifies a latency period of only ten years as a diagnostic marker for asbestos-related lung cancer in smokers. *Id.* § 2307.92(C)(1)(b). By comparison, the ABA Commission on Asbestos Litigation—which worked with "a group of ten of the nation's most prominent physicians in the area of pulmonary function" to design a set of standards for asbestos-related impairments that would not "unfairly exclude any significant number of deserving claims," *ABA Report* 11, 13—recommended that a minimum 15-year latency period between exposure and the onset of non-malignant disease be required. *Id.* at 12.

c. Petitioners also assert that preemption of the Ohio statute is required because the statute "imposes a different, stricter causation standard" than the FELA itself imposes. Pet. 15. Petitioners focus on the requirement in the Ohio statute that a plaintiff make a prima facie showing that "'exposure to asbestos' is 'a *substantial contributing factor* to the medical condition'" alleged in the lawsuit. *Ibid.* (quoting Ohio Rev. Code Ann. § 2307.92(B) (LexisNexis 2005)). Petitioners claim that the "substantial contributing factor" standard is in tension with the "relaxed standard of causation" that applies under the FELA. Pet. 14 (quoting *Gottshall*, 512 U.S. at 543). For several reasons, that contention does not warrant the Court's review.

First, the Ohio Supreme Court did not interpret the phrase in the Ohio statute on which petitioners rely,

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[6] The ILO scale was created by the International Labour Organization as a means for standardizing the classification of dust-related changes on chest x-rays. *ABA Report* 13. A grade of 1/0 "indicates that the reader found evidence of lung irregularities—the '1'—but also considered whether the x-ray should be read as normal, or '0.'" *Ibid.*

"substantial contributing factor." The Ohio court thus did not attempt to compare the nexus between past asbestos exposure and a current injury required under the "substantial contributing factor" standard to any equivalent nexus that would be required to establish asbestos-related injury under the FELA in federal court. To the extent that the court *suggested* how it would interpret the Ohio statute in future cases, the clear implication of the court's opinion is that the Ohio statute would not be interpreted to impose evidentiary burdens that exceed FELA standards: the court wrote that in FELA cases the Ohio statute does *not* "make it more difficult for a claimant to succeed on the merits of a claim." Pet. App. 8a.

This Court has previously declined review of a state court judgment where "significant ambiguities in the record" obscured the framing of the constitutional issues presented for review. See *Minnick* v. *California Dep't of Corr.*, 452 U.S. 105, 127 (1981). The same result is appropriate here. Any review of the preemption implications of Ohio's "substantial contributing factor" standard should await a future case in which there is a record of medical evidence proffered by a FELA plaintiff and an application of the "substantial contributing factor" standard in evaluating that evidence. This case, which arises in an abstract declaratory judgment posture, provides neither component essential to meaningful review by this Court.

Second, petitioners' arguments for further review fail to focus on the distinct nature of the injury in asbestos tort suits—the requirement, announced by this Court in *Buckley* and confirmed in *Ayers*, that a plaintiff must suffer from a symptomatic asbestos-related disease in order to recover on an asbestos claim under the

FELA. As petitioners note (Pet. 15 n.6), the standard for legal causation under the FELA is unsettled. See *Sorrell*, 549 U.S. at 163-164 (declining to address whether *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500 (1957), altered the common-law rule of proximate causation in FELA cases); *id.* at 172-177 (Souter, J., concurring) (opining that *Rogers* did not "water down the common law requirement of proximate cause"); *id.* at 177-182 (Ginsburg, J., concurring in the judgment) (opining that "the causation standard in FELA actions is more 'relaxed' than in tort litigation generally"). Resolution of that uncertainty is not necessary in evaluating Ohio's statutory medical criteria in the posture of this case. Those statutory provisions address the medical questions whether the plaintiff has a disease *at all* and whether it was caused by asbestos, and they do not address whose asbestos caused the disease or to what extent.[7] The Ohio statute identifies an alleged injury as an asbestos-related impairment.[8]

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[7] A separate provision of the Ohio statute governing the burden of proof at trial requires asbestos plaintiffs to "prove that the conduct of [each] particular defendant was a substantial factor in causing the injury or loss on which the cause of action is based." Ohio Rev. Code Ann. § 2307.96(A) (LexisNexis 2005). That provision is not at issue here. Nor does this case implicate the Ohio provision that bars the award of damages for a plaintiff's fear or risk of developing cancer in the future. *Id.* § 2307.94(B) (discussed at Pet. 14 n. 5); see *Ayers*, 538 U.S. at 157-159 (permitting FELA plaintiffs who suffer from asbestosis to recover damages for fear of cancer).

[8] The record in this case likewise does not establish that the provisions of the Ohio statute requiring *reliable* evidence of asbestos-related injury (for instance, a diagnosis by a "competent medical authority") interfere with substantive federal rights. Indeed, federal law also dictates meaningful criteria of reliability for claims involving medical questions. See, *e.g.*, *Daubert* v. *Merrell Dow Pharm., Inc.*, 509

Third, petitioners are mistaken in contending (Pet. 12-14), that the Ohio Supreme Court's decision conflicts with *Felder*. In *Felder*, the Court found a "manifest[] inconsisten[cy]" between the purpose of the Wisconsin notice-of-claim statute (*i.e.*, to minimize governmental liability in civil rights actions by giving government defendants the advantages of early investigation and the opportunity for early settlement) and the purpose of the federal civil rights statute (*i.e.*, to provide compensatory relief to those deprived of civil rights by state actors). *Felder*, 487 U.S. at 141-153. Petitioners assert that this case presents a policy clash akin to that in *Felder* because the aim of Ohio's statute, "like the statute in *Felder*, is to reduce the number of successful claims, thereby reducing total liability." Pet. 13; see Pet. 6. Petitioner's premise, however, runs counter to the determination by Ohio's highest court that the statute's purpose is *not* to reduce overall liability, but instead is to "place those already ill at the head of the line for compensation." *Sinnott* v. *Aqua-Chem, Inc.*, 876 N.E.2d 1217, 1221 (Ohio 2007). Moreover, petitioners' view that the FELA's singular goal is "to afford broad recovery to FELA claimants" (Reply Br. 6) also is oversimplified. As this Court has recognized, although the FELA "was indeed enacted to benefit railroad employees, * * * [i]t does not follow * * * that this remedial purpose requires" that the statute invariably be interpreted "in favor of employees." *Sorrell*, 549 U.S. at 171. See *Gottshall*, 512 U.S. at 543 ("That FELA is to be liberally construed * * * does not mean that it is a workers' compensation statute."). This Court has made clear

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U.S. 579, 589 (1993) (Federal Rules of Evidence require "any and all scientific testimony or evidence" to be "not only relevant, but reliable.").

that, in the context of allegedly negligent workplace exposure to asbestos, the FELA offers no relief to railroad workers in the absence of "injury" in the form of a current asbestos-related disease. *Buckley*, 521 U.S. at 433. As discussed above, so far as the Ohio statute on its face and the current record reveal, the purpose and effect of the Ohio statute is consistent with those of the FELA, in that it *identifies* and *expedites* cases in which asbestos-related disease is present. *Felder* therefore does not call for preemption here.

3. The Ohio statutory scheme attempts to tackle widely-recognized core problems in asbestos litigation—that suits by plaintiffs who have been exposed to asbestos but who manifest no asbestos-related disease outnumber suits by symptomatic plaintiffs, and that the funds to pay all asbestos claimants are finite and dwindling. A case prioritization system based on specified medical criteria, such as the one enacted in Ohio, has been recommended as a sensible approach by some commentators. See, *e.g.*, *Worst Should Go First*, *supra*. And, as the Ohio Supreme Court noted (Pet. App. 14a), the federal district court handling multi-district litigation of asbestos-related cases has instituted a similar method for prioritizing the cases on its docket so as to "protect the rights of all of the parties, yet preserve and maintain any funds available for compensation to victims." *In re Asbestos Prods. Liab. Litig.*, No. MDL 875, 2002 WL 32151574, at *1 (E.D. Pa. Jan. 16, 2002).

Regardless of whether this Court's review of case-prioritization schemes such as Ohio's could be warranted in the future (for example, if it turned out that such schemes were being applied to preclude or unduly limit FELA recovery for asbestos-related claims in state courts), review of such questions would be unfruitful in

the posture of this case, where the Ohio courts have had no opportunity to interpret and apply their statute in the context of concrete facts.

II. PETITIONERS IDENTIFY NO CONFUSION AMONG STATE COURTS REGARDING FELA PREEMPTION THAT WARRANTS THE COURT'S INTERVENTION

Petitioners' further contention that the Court should grant review to address general "confusion in state courts regarding FELA preemption" (Pet. 26-33) also is without merit. Even if such "confusion" existed, this case would be a poor vehicle for addressing it. As already discussed, the record here is inadequate to meaningfully evaluate FELA preemption in the particular context of the Ohio statute's medical screening provisions.

Moreover, petitioners' suggestion that a "line of state courts" has erroneously held that "a conclusion that a rule is procedural is the beginning *and* the end of the inquiry as to whether a rule may be applied to FELA claims" (Pet. 27) does not withstand scrutiny. The court in *Allen* v. *National Railroad Passenger Corp.*, 934 So. 2d 1006, 1013-1016 (Miss. 2006), expressly declined to rule upon questions regarding the FELA, because the only question before it was whether dismissal of plaintiff's action as a sanction for willful discovery violations was an abuse of discretion. The Montana Supreme Court in *Rule* v. *Burlington Northern & Santa Fe Railway*, 106 P.3d 533 (2005), relied upon direct authority from this Court when it observed that its state venue statute was procedural and not preempted by the FELA. *Id.* at 536 (citing *Miles* v. *Illinois Cent. R.R.*, 315 U.S. 698, 703 (1942)). And the Alabama Supreme Court in *Alabama Great Southern Railroad* v. *Jackson*,

587 So. 2d 959 (1991), cert. dismissed, 502 U.S. 1083 (1992), simply applied state law after correctly stating that "[a]s a general matter, FELA cases adjudicated in a state court are subject to the state's procedural rules" while "the substantive law governing such cases is federal." *Id.* at 962.

Nor is there a basis for petitioners' contention that FELA preemption decisions out of Kansas and Illinois lack "reasoned or meaningful analysis." Pet. 28. In *Gaulden* v. *Burlington Northern, Inc.*, 654 P.2d 383 (1982), after noting that the FELA "does not provide a vehicle for the determination of the fault of a third party," the Kansas Supreme Court reasoned that the FELA's objectives would not be undermined by state rules authorizing suits by FELA defendants for contribution from third parties, "so long as [contribution] is not utilized to reduce the recovery of damages to which the employee is entitled under FELA." *Id.* at 389. Similarly, the Illinois Supreme Court found no impairment of the FELA right to trial by jury in *Castro* v. *Chicago, Rock Island & Pacific Railroad*, 415 N.E.2d 365 (1980), cert. denied, 452 U.S. 941 (1981), where the state procedural rule in question did not apply if a timely jury demand was filed, and the rule thus "protect[ed] [FELA plaintiffs'] right to trial by jury." *Id.* at 367. Both state supreme courts articulated reasons for their holdings, and petitioners demonstrate no error in that reasoning.

Petitioners also contend that there is a "substantial[] conflict[]" (Pet. 30) between the Ohio Supreme Court's opinion and the Georgia Supreme Court's decision in *DaimlerChrysler Corp.* v. *Ferrante*, 637 S.E.2d 659 (2006). That is incorrect. The court in *Ferrante* evaluated whether a Georgia statute—which required a prima facie showing in asbestos cases similar to that required

by the Ohio statute—could be applied retrospectively to pending cases under Georgia law. The court ruled that the new statute could not be applied retrospectively because the standard it contained ("prima facie evidence that asbestos was a *substantial* contributing factor to [the plaintiff's] medical condition") exceeded the standard that previously applied under Georgia law ("a plaintiff was required to show only that exposure to asbestos was a *contributing* factor in his or her medical condition"). *Id.* at 661. The court held that the new statute "impose[d] upon appellees a greater evidentiary burden than was required under the law in effect at the time their actions were filed," "affect[ed] appellees' substantive rights," and could not, as a matter of Georgia law, be applied retroactively. *Ibid.*

Ferrante has little relevance to this case. First, *Ferrante* did not involve the FELA or preemption principles. The Georgia Supreme Court instead considered whether its statute was "substantive" under the standards generally used to establish the liability of joint tortfeasors. Moreover, unlike the Georgia court, the Ohio Supreme Court has not opined on the meaning of its "substantial contributing factor" standard, other than to suggest that it is no more demanding than the good faith pleading standard contained in Ohio Rule of Civil Procedure 11. Finally, the Georgia statute does not contain protections (such as the tolling of the statute of limitations) that apply in Ohio and serve to protect the right to recovery under the FELA. Thus, nothing about *Ferrante* warrants review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General
GREGORY G. KATSAS
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
LISA H. SCHERTLER
Assistant to the Solicitor General
THOMAS M. BONDY
ANNE MURPHY
Attorneys

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